Retroactivity of Tax Legislation

Gribnau, J.L.M.; Pauwels, M.R.T.

Publication date:
2013

Document Version
Publisher's PDF, also known as Version of record

EATLP
Leuven 2010 Congress

Retroactivity of tax legislation

2010 EATLP Congress, Leuven
27-29 May 2010

Retroactivity of tax legislation

Hans Gribnau and Melvin Pauwels
editors & general reporters

Contributors

Fabrizio Amatucci
Koos Boer
Charlotte Crane
Emmanuel de Crouy-Chanel
Daniel Deak
Katarina Fast
Hans Gribnau
Pedro Herrera
Johanna Hey
Anders Hultqvist
Piotr Karwat
Geoffrey Loomer
Allard Lubbers
Jukka Mähönen
Panagiotis G. Melissinos
Ana B. Macho
Peter Melz
Aage Michelsen
Jacob Graff Nielsen
Melvin Pauwels
Bruno Peeters
Patricia Popelier
Ethel Puncher
Konstantinos Remelis
Alain Steichen
Gloria Teixeira
Eleni Theocharopoulou
Henk Vording
David Williams
Billur Yalti

This volume of the EATLP Congress Reports is financially sponsored by the IBFD which also acts as the distributor.

ISBN 978-90-816475-0-2

Table of contents
Summary

Part 3

Table of contents
Detailed

Preface

This volume is the result of the 2010 congress of the EATLP held in Leuven. The main subject of this conference was retroactivity in taxation. By way of preparation a questionnaire, national reports, and a general report were written. After the conference we asked the national reporters to finalize their reports on the basis of the discussions in Leuven and our comments and questions. Most of the national reports were finalized by the end of 2010. We subsequently revised the general report.

In this volume of the EATLP International Tax Series, we are publishing the revised general report, the questionnaire, and the finalized national reports. Some of these national reports are quite succinct because of lack of information or because many of the issues do not arise.[1] We are nevertheless including these national reports because the more (structured) the information offered here, the more insights the reader may gain. Further, a number of special topics are dealt with in separate chapters as, in the process of drafting the questionnaire and the general report we encountered a number themes which are of particular importance with regard to retroactivity of tax legislation. The 2010 Leuven congress dealt with three of these themes:

- Legislating by Press Release, introduced by Melvin Pauwels and debated by Philip Baker and Johanna Hey;
- Validation Statutes and Interpretative Statutes, introduced by Fabrizio Amatucci and debated by Bruno Peeters and Peter Melz;
- Retroactivity in Law & Economics, introduced and debated by Daniel Shaviro and Charlotte Crane.

Another theme was 'Retroactivity of the European Court of Justice judgments', which was introduced by Mathieu Isenbaert and debated by Peter Wattel and Pasquale Pistone. Not being related to retroactivity of tax legislation this issue will not be included in this volume.

The above-mentioned special topics related to retroactivity of tax legislation are dealt with in this volume. Furthermore, there are a few contributions on some other special themes which we found less suitable for a debate with the large audience in Leuven.[2]

Consequently, this book is organized as follows: the general report (Part 1), the contributions on the special topics, starting with the contributions of a more general nature and concluding with contributions written from an economic perspective (Part 2), and finally the questionnaire and the national reports in alphabetical order (Part 3). Taken together, the contributions on the special topics and the reports contain a wealth of information which enable the reader to gain an insight into a very complex subject.

---

1. Questions concerning issues on which no information is available or which are not applicable are omitted in these national reports.
2. Peter Essers very skilfully chaired the lively debate in Leuven, for which we owe him many thanks.

We owe many thanks to the national reporters and contributors to this book, to Peter Essers for his encouragement and to Maiko van Bakel who assisted in the editing.

Hans Gribnau and Melvin Pauwels

November 2011

List of authors

Fabrizio Amatucci is Ordinary Professor of Tax Law and International Tax Law at the Second University of Naples, Italy. He is Director of the Department of Legal Sciences and Director of the Master of Tax Law of the Second University of Naples. He is the Italian member of the Academic Committee of EATLP. He studied law (Degree 1992), at the Federico II University of Naples where he also obtained his PhD.

Koos Boer is Professor of Tax Law at Leiden University. He obtained his PhD at Leiden University (2011) and is a substitute judge in the District Court of Haarlem. He also works as a tax lawyer for Deloitte in the Netherlands.

Charlotte Crane is Professor of Law at Northwestern University School of Law where she teaches in both the JD and Graduate Tax Programs. She has served as a clerk to judges on the United States Court of Appeals for the Sixth Circuit and the Supreme Court of the United States, and, most recently, she served as Professor in Residence at the Office of Chief Counsel of the Internal Revenue Service of the United States.

Emmanuel de Crouy-Chanel is a full Professor of Public Law at the Law Faculty of the Université de Picardie. He also teaches public finances and personal tax law at the Université of Paris I, Panthéon-Sorbonne. He is a member of the centre of research Sorbonne-Droit, Département Sorbonne-Fiscalité.

Daniel Deak is a full professor at the Corvinus University of Budapest. He teaches and does research inside and outside Hungary on the subject of comparative and international business law and taxation. Since 1998, he has been the president of the Hungarian national branch of the International Fiscal Association. In addition to being active as a scholar, from time to time he is also invited by Hungarian or European public agencies – including the Hungarian Finance Ministry, the Ministry of Justice, and TAXUD and the Internal Market DG of the European Commission – to give an expert opinion, while being expected to promote Hungarian and Community legislation.

Katarina Fast is LLD candidate at Stockholm University.

Hans Gribnau is Professor of Tax Law at the Fiscal Institute and the Center for Company Law (Tilburg University) and at Leiden University. He obtained his PhD at the Erasmus Universiteit Rotterdam (1998).

Pedro Herrera is Professor of Tax Law at the Universidad Nacional de Educación a Distancia (Spanish Distance University), visiting professor at the Vienna University of Economics and Business – WU, member of the Academic Committee of the Spanish Association of Tax Law Professors, former Research Adviser of the Spanish Institute of Fiscal Studies (Ministry of Finance).

Johanna Hey is Ordinary Professor of Tax Law and Director of the Institute of Tax Law at Cologne University, Germany. She is a member of the Scientific Advisory Board of the German Federal Ministry of Finance.

Anders Hultqvist is Professor of Tax Law, Stockholm University.

Piotr Karwat is an adjunct and senior lecturer at the Financial Law Department of the Faculty of Law and Administration (Warsaw University). He obtained his PhD at Warsaw University in 2001.

Geoffrey Loomer is Assistant Professor at the Schulich School of Law, Dalhousie University, in Halifax, Canada. He obtained a BSc in Economics from the University of Victoria, an LLB from the University of British Columbia, and a BCL and DPhil from the University of Oxford (Merton College). Mr Loomer is a research affiliate with the Oxford University Centre for Business Taxation.

Allard Lubbers is Professor of Tax Law at the University of Leiden since August 2003. Lubbers works one day a week at the Research Bureau of Deloitte Tax Lawyers in Rotterdam. He is also deputy judge in the tax chamber of the Court of Appeals in Amsterdam and in Den Bosch.

Jukka Mähönen is the Dean and Professor of Civil Law of the Faculty of Law at the University of Turku. He obtained an MSc (Econ) in financial accounting from the Turku School of Economics, an LLM from the University of California at Berkeley and an LLD from the University of Turku. His main research interests are corporate and securities law, corporate taxation and economic analysis of law. He is also the chairperson of the Auditing Board of the State of Finland.

Panagiotis G. Melissinos is a postgraduate student in the Master's Program of Law in Finance at the Institute of Law and Finance Goethe University Frankfurt am Main Germany. He studied Law (Degree 2010) at the Democritus University of Thrace (Greece) and Accounting and Finance (Degree 2006) at the Athens University of Economics and Business (Greece).

Ana B. Macho is Associate Professor in Financial and Tax Law at the Universitat Pompeu Fabra (UPF) in Barcelona, where she is associate dean of the Law School since 2010. She holds a PhD in Law (2006) from this university, for which she received the Extraordinary Prize of the Law Department of the UPF, the Prize of the Spanish Institute of Fiscal Studies, and the Special Mention of the International Prize Norberto Bobbio 2007. She has made several research visits to the Westfälische Wilhelms-Universität Münster, Università di Bologna, Universidade de Lisboa and Fundação Getulio Vargas in São Paulo.

Peter Melz is Professor of Fiscal Law at the Stockholm University.

Aage Michelsen is a full Professor of Tax Law at the Department of Law, University of Aarhus. He studied law at University of Aarhus (degree 1965) and is one of the professors who founded EATLP. Professor Michelsen is vice-president of the Nordic Tax Research Council and member of a number of tax research networks and committees. He has also been the Danish member of the Academic Committee of EATLP.

Jacob Graff Nielsen is full Professor of Tax Law at the Faculty of Law, University of Copenhagen, where he also holds the position as Head of Research. He studied law at the Faculty of Law, University of Copenhagen (degree 1998) and obtained his PhD degree at the same faculty in 2003. Jacob Graff Nielsen is the Danish member of the Academic Committee of EATLP.

Melvin Pauwels is Lecturer in Tax Law at the Fiscal Institute (University of Tilburg) and at the time of writing his contributions to this volume he was a court assistant with the Research Office of the Supreme Court of the Netherlands. He wrote his PhD thesis on the subject of retroactive tax legislation, using a legal theory perspective.

Bruno Peeters is Ordinary Professor of tax Law at the University of Antwerp. He studied law (Lic. Iuris, 1982) and philosophy (Bachelor in Philosophy, 1979) at the University of Antwerp where he also obtained his PhD (1988) and where he is currently Director of the Master of Tax Law and Director of the Antwerp Tax Academy. He is also member of the Antwerp Bar, practicing in the field of tax law.

Patricia Popelier is Ordinary Professor of Constitutional Law and Legislative Studies at the University of Antwerp, director of the research group on government and law, president of the Interuniversity Centre of Legislation and Vice-President of the International Association of Legislation.

Ethel Puncher studied at the University of Antwerp and took a Master of Law (2008) and Master of Tax Law (2009). She is employed at the international tax division of Deloitte tax consultants. At this time she is also trainee at the Belgian Institute of Accountants and Tax Consultants.

Konstantinos Remelis is Professor of Administrative Law at the Faculty of Law of Democritus University of Thrace in Greece. From 2006 until recently he held the position of the President of the Faculty of Law of the Democritus University. He is now (elected) Rector of the Democritus University and Member of the Greek National Council for the Protection of Human Rights. He studied law (Degree 1982), at Democritus University where he also obtained his PhD.

Alain Steichen is Associate Professor at the University of Luxembourg.

Gloria Teixeira is Professor of Tax Law at the University of Porto, Faculty of Law. She obtained her PhD at the University of London, Queen Mary College. She is director of the CIJE (Centre for Legal and Economic Research).

Eleni Theocharopoulou is Assistant Professor of Tax Law at the Democritus University of Thrace (Greece) and member of the Thessaloniki Bar, practicing in the field of tax law and general public law. She studied law (Degree 1992) at the Aristotle University of Thessaloniki (Greece) and she obtained her DEA (1993, Publique Finances and Taxation) and her PhD in tax law (2000) from the University of Paris II (France). She is the Greek deputy member of the Academic Committee of the EATLP (2008-2011).

Henk Vording is Professor of Tax Law, Leiden University. He is the leader of the research program 'the boundaries of tax sovereignty' and director of the bachelor's and master's programs in tax law at Leiden University.

David Williams is a judge of the United Kingdom Upper Tribunal and was previously a professor of tax law in the University of London.

Billur Yalti is Professor of Tax Law at the Faculty of Law of Koc University in Istanbul, Turkey.

Abbreviations

Art.	article
cf.	compare
ch.	chapter
e.a.	et al. (and others)
EC	European Commission
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
ECtHR	European Court of Human Rights
ed.	edition
ed(s).	editor(s)
e.g.	for instance
etc.	etcetera
et seq.	and the following
ff	and the following
GAAR	General anti-avoidance rule
i.e.	id est (that is)
judgm.	judgment
no.	number
p. (pp.)	page(s)
para(s)	paragraph(s)
PITA	Personal Income Tax Act
s.	section
sec.	section(s)
VAT	Value Added Tax
viz.	videlicet (namely)
vol.	volume

The Law and Economics Approaches to Retroactive Tax Legislation

Am. J. Tax Pol'y	American Journal of Tax Policy
Calif. L. Rev.	California Law Review
Colum. J. Tax L.	Columbia Journal of Tax Law
Colum. L. Rev.	Columbia Law Review
Harv. L. Rev.	Harvard Law Review
J. Contemp. Legal Issues	Journal of Contemporary Legal Issues
J. Legal Stud.	Journal of Legal Studies
J. Pub. Econ.	Journal of Public Economics
Mich. L. Rev.	Michigan Law Review
Minn. L. Rev	Minnesota Law Review

Nat'l Tax J.	National Tax Journal
Rev. Econ. Stud.	Review of Economic Studies
SMU L. Rev.	SMU Law Review
Tax L. Rev.	Tax Law Review
U. Chi. L. Rev.	University of Chicago Law Review
U. Pa. L. Rev.	University of Pennsylvania Law Review
Va. L. Rev.	Virginia Law Review
Va. Tax Rev.	Virginia Tax Review

Legislation 'by' press release: The role of announcements in the debate about retroactive tax legislation

BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
BVerfGE	Entscheidungen des Bundesverfassungsgerichts

Retroactive interpretative statutes and validation statutes in tax law: an assessment in the light of legal certainty, separation of powers and the right to a fair trial

Bull. Civ.	Bulletin des arrêts de la Cour de Cassation
Cath. Univ. L. Rev.	Catholic University Law Review
Cass.	Hof van Cassatie (Courts of Cassation)
C.C.	Constitutional Court
Eur. Human Rights L. Rev.	European Human Rights Law Review
Eur. J. L. Reform	European Journal of Law Reform
Pas.	Pasicrisie
Rec.	Receuil des décisions du Conseil constitutionnel
Rep.	Reports of Judgments of the European Court of Human Rights

Austria

ÖStZ	Österreichische Steuerzeitung
VfSlg	verfassungsgerichtliche Sammlung (Court reports of the Austrian Constitutional Court)
VfGH	Verfassungsgerichtshof (Constitutional Court)

Belgium

A.F.T.	Algemeen Fiscaal Tijdschrift
Arr. Cass.	Arresten van het Hof van Cassatie
B.S.	Belgisch Staatsblad
Cass.	Hof van Cassatie (Courts de Cassation)
Circ.	Circulaire
Fisc. Act.	Fiscale Actualiteit
F.J.F.	Fiscale jurisprudentie. /Jurisprudence Fiscale
ITC	Income Tax Code
J.D.F.	Journal de droit fiscal
J.L.M.B.	Jurisprudence de la Cour de Liège, de Mons et de Bruxelles

N.T.E.R.	Nederlands Tijdschrift voor Europees Recht
Parl. St.	Parlementaire Stukken
Pas.	Pasicrisie
Rb.	Rechtbank
Rev. Trim. Dr. Fam.	Revue trimestrielle de droit familial
R.G.F.	Revue générale de fiscalité
R.W.	Rechtskundig Weekblad
T.F.R.	Tijdschrift voor fiscaal recht
T.Gem.	Tijdschrift voor gemeenterecht
T. Not.	Tijdschrift voor notarissen
T.P.R.	Tijdschrift voor privaatrecht
T.v.W.	Tijdschrift voor wetgeving

Canada

A.C.	Appeal Cases (United Kingdom)
c.	chapter
C.A.	Court of Appeal (United Kingdom)
Canadian Bar Rev.	Canadian Bar Review
Ch.	Chancery Division (United Kingdom)
CRA	Canada Revenue Agency
C.T.C.	Canadian Tax Cases
F.C.A.	Federal Court of Appeal
F.C.T.D.	Federal Court Trial Division
ITA	Income Tax Act
P.C.	Privy Council
R.S.C.	Revised Statutes of Canada
Supp.	supplement
S.C.	Statutes of Canada
SCC	Supreme Court of Canada
S.C.R.	Supreme Court Reports
S.T.C.	Simon's Tax Cases
TCC	Tax Court of Canada
U.B.C. Law Rev.	University of British Columbia Law Review
Vic.	Victoria

Denmark

H	Judgment of the Danish Supreme Court (Højesteret)
Ø	Judgment of High Court of Eastern Denmark (Østre Landsret)
R & R	Regnskab og Revisionsvæsen (Danish Accounting Journal)
SKM	The Danish Tax Ministry's numerical system for publishing judgments, administrative notices etc at www.skat.dk
TfS	Tidsskrift for Skatter og Afgifter (Journal for Tax and Excise), Magnus Informatik Publishers
UfR	Ugeskrift for Retsvæsen (Weekly Law Journal), Karnov Group Publishers
V	Judgment from High Court of Western Denmark (Vestre Landsret)

France

ass.	assemblée
Cass. com.	Cour de cassation, chambre commerciale
CE	Conseil d'Etat
Cons. const.	Conseil Constitutionnel
DC	décision de constitutionnalité
QPC	question prioritaire de constitutionnalité

Germany

Anm.	Anmerkung
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
BB	Betriebs-Berater
DB	Der Betrieb DStJG (Deutsche Steuerjuristische Gesellschaft)
DStR	Deutsches Steuerrecht
DV	Die Verwaltung
EFG	Entscheidungen der Finanzgerichte
EStG	Einkommensteuergesetz
FR	Finanzrundschau
GG	Grundgesetz
GrS	Großer Senat
JuS	Juristische Schulung
KStG	Körperschaftsteuergesetz
NJW	Neue Juristische Wochenschrift
ThVBl.	Thüringer Verwaltungsblätter
StuW	Steuer und Wirtschaft
Wpg	Die Wirtschaftsprüfung

Greece

AED	Anotato Eidiko Dikastirio (Greek Supreme Special Court)
AP	Areios Pagos (Greek Civil and Criminal Supreme Court)
DefAth	Diikitiko Efeteio Athinon (Athens Administrative Court of Appeal)
DefKom	Diikitiko Efeteio Komotinis (Komotini Adminitstrative Court of Appeal)
ENOVE	Enosi Nomikon Voriou Elladas (Union of Jurists of Northern Greece)
ES	Elegtiko Synedrio (Greek Court of Auditors)
OlAP	Olomeleia AP (Areios Pagos sitting in plenum)
OlES	Olomeleia ES (Greek Court of Auditors sitting in plenum)
OlStE	Olomeleia StE (Greek Council of State sitting in plenum)
P.d.	presidential decree
StE	Symboulio tis Epikrateias (Greek Council of State)

Hungary

AB	Alkotmánybíróság
A.C.	Hivatalos Lap
HL	
UKHL	United Kingdom House of Lords

Italy

dec.	decision
L.	law
sez.	section

Portugal

CPPT	Código de Procedimento e de Processo Tributário
CRP	Constituição da República Portuguesa
LGT	Lei Geral Tributária (General Tax Law)
proc.	processo
RCPIT	Regime Complementar do Procedimento de Inspecção Tributária
T.C	Tribunal Constitucional

Sweden

IG	Instrument of Government
NJA	Collection of judgments from the Supreme Court
Prop.	Government bill
RA	Parliament (Riksdag) Act
SFS	Svensk Författningssamling (Swedisch Code of Statues)
Skr.	Government communication to the parliament
SOU	Swedish Government Official Reports

The Netherlands

BNB	Beslissingen Nederlandse Belastingrechtspraak

Turkey

CITL	Corporate Income Tax Law
E	Esas
K	Karar
SAC	Supreme Administrative Court
TC	Turkish Constitution
TCC	Turkish Constitutional Court
TPL	Tax Procedure Law
VATL	Value Added Tax Law

United Kingdom

AC	Appeal Cases
HMRC	Her Majesty's Revenue & Customs
MP	Member of Parliament
STC	Simon's Tax Cases
UKHL	United Kingdom House of Lords
WLR	Weekly Law Reports

United States

Am. J. Tax Policy	American Journal of Tax Policy
App.	Appeals
cert.	certiorari
Cir.	Circuit
Ct.	Court
Conn. L. Rev.	Connecticut Law Review
IRS	Internal Revenue Service
N.Y.U. L. Rev	New York University Law Review
Rev. Rul.	Revenue Ruling
Supp.	Supplemental (in 'Federal Supplement'; the federal district court opinions report)
U. Chi. L. Rev.	University of Chicago Law Review
U.S.	United States
U.S.C.	United States Code
U.S.C. Law School Tax Inst	University of Southern California Law School Tax Institute

List of Tables

Part 1
General Report

Hans Gribnau and
Melvin Pauwels

1.1. Introduction

This general report deals with a number of topics. These topics concern terminology, i.e. the different concepts in uses with regard to retroactivity (and retrospectivity), ex ante evaluation of retroactivity; the use of retroactivity in legislative practice, ex post evaluation of retroactivity (in case law), and views in the literature. In the parts on ex ante evaluation of retroactivity, the use of retroactivity in legislative practice and ex post evaluation of retroactivity (in case law), the focus is on the various possibilities to use retroactive tax legislation and limitations on the use of retroactive tax legislation. In presenting the information with regard these topics we will not always strictly follow the questionnaire; for the purpose of readability we sometimes combine related issues (questions). Of course, it is not possible to present the information in the national reports down to the smallest detail. The answers received to some questions were too diverse to recapitulate in this general report.

Another set of remarks concerns the focus of the questionnaire and this general report. The focus is mainly retroactivity of tax legislation. The issue of retroactivity of case law is thus not discussed in this general report, notwithstanding the importance of the subject.[1] Furthermore, in particular retroactivity of Acts of Parliament is discussed. Thus, hierarchical lower tax rules, such as subordinate legislation, regulations, decrees, etc. are largely left aside. Moreover, we mainly deal with substantive tax law and not with procedural tax law. Finally, the focus is on tax law, not on criminal law; hence, retroactivity with regard to criminal offences against taxation laws is only indirectly touched upon.

As concerns the method used, we note the following. First, a draft questionnaire was compiled and sent to the various national reporters for comments. Some of the national reporters provided us with comments, which we used to adjust and to extend the questionnaire. The final questionnaire was then sent to the national reporters.[2] The national reporters submitted (draft) national reports based on the questionnaire. These national reports have been used in writing a draft general report. This draft was published on the EATLP website for the purpose of the 2010 EATLP congress in Leuven on 28 May 2010. After the 2010 EATLP congress, the draft was sent to the national reporters for consultation. The national reporters were invited to comment on the draft general report, especially whether the report contained vague or even mistaken interpretations of the national reports or needed to be supplemented. Some national reporters provided us with comments, for which we are very grateful. The national reporters were also asked to finalize their national reports further to the EATLP congress. In this respect, we asked some of the national report-

1. During the 2010 EATLP congress, one debate session concerned this subject, in particular retroactivity of case law of the ECJ. This debate was introduced by Mathieu Isenbaert; debaters were Peter Wattel and Pasquale Pistone.
2. The questionnaire is included in this book.

ers individually to expand on some issues in their report, either because the issue discussed was interesting and deserved more attention or for clarification reasons. This general report has been written based on the draft version of the general report, the comments from the national reporters on it, the final national reports, and the discussions during the EATLP congress. Compared to the draft version, information concerning more countries has been included in this final general report, since not every national report was available at the moment the draft version was compiled.

Finally, this report could not have been written without the work done by the national reporters; we are very grateful for their industry.

1.2. Terminology

1.2.1. Introduction

Before it is possible to analyse the issue of retroactivity with respect to substance, the terminology used should be made clear. This is necessary because there is an important risk of misunderstanding. The reason is that, in the literature as well as in case law, different concepts are used with various meanings when dealing with the phenomenon of retroactivity in legislation.[3]

We note that when dealing with the issue of retroactivity in this report we do not make a distinction between the introduction of a tax statute and the change (amendment) of an existing tax statute, for there is no conceptual difference between the two. After all, a change in an existing statute is realized by means of the introduction of a statute that provides for the change.

1.2.2. Retroactive vs. retrospective

In the English language a potential misunderstanding may arise when using the concepts of retroactivity and retrospectivity. First of all, these concepts are sometimes (implicitly or explicitly) considered synonyms or interchangeable, but sometimes a conceptual distinction is (implicitly or explicitly) made between retroactivity and retrospectivity. Secondly, *if* a conceptual distinction is made, the meaning of retroactivity and retrospectivity is not the same in the various countries and legal discourses in which English is spoken or used. It is even the case that what in the one country is called 'retroactive', in another country is called 'retrospective', and *vice versa*. This latter has been established more in particular for the area of taxation by, for example, Bobbett in an article in *British Tax Review*[4] with references to the way both terms are used in the case law in various English-speaking countries. The mixed use of retroactivity and retrospectivity has also been noted in the national reports of Canada and the United Kingdom.

---

3. See in this regard amongst others Catherine S. Bobbett, 'Retroactive or retrospective? A note on terminology', *British Tax Review* (2006), at pp. 15-18 and M.R.T. Pauwels, *Terugwerkende kracht van belastingwetgeving: gewikt en gewogen* (Retroactivity of tax legislation: weighing and balancing) (Amersfoort: Sdu Uitgevers, 2009), chapter 2.
4. Bobbett, *supra* note 3, at pp. 15-18. See also E. Edinger, 'Retrospectivity in law', *University of British Columbia Law Review*, (1995), at p. 10, G.T. Loomer, 'Taxing out of time: parliamentary supremacy and retroactive tax legislation', *British Tax Review* (2006), at pp. 65-66, and B. Juratowitch, *Retroactivity and the common law*, (Oxford: Hart Publishing, 2008), at pp. 5-13

In accordance with Bobbett's[5] proposal and in line with the way the ECJ uses the term[6], this general report uses the term 'retroactive' for the situation in which a legal provision changes the past legal consequences of facts that occurred before the provision was officially published. In other words, the term is used where the legal provision is applicable to taxable events that occurred prior to its official publication. The term 'retrospective' will be used for the situation in which a new legal provision has 'immediate effect', without grandfathering[7] existing situations, and as such is also applicable to the future consequences of transactions or events that have already happened.[8]

In almost all countries, the courts or at least legal discourse does make a comparable conceptual distinction between 'retroactivity' and 'retrospectivity' (*casu quo* between the national counterparts of these concepts).[9] It is interesting to mention that in many of these countries the national language has its limits in the sense that, other than in the English language, two separate terms are not available. In these countries the language has only one term, but nonetheless a conceptual distinction between 'retroactivity' and 'retrospectivity' is achieved, e.g. by adding adjectives to the term (e.g. formal and material, true and untrue, etc.).

The above-mentioned use of the concepts of 'retroactive' and 'retrospective' in this report implies that the term 'retroactive' is used in the narrow sense. In the literature, not only the law and economics literature but also in other legal literature, the term 'retroactive' is sometimes also used in the broad sense, i.e. also covering what is called here 'retrospective'.[10]

The risk of conceptual misunderstanding also appears from the fact that a great variety of terms exists. This is confirmed by analysis of the various national reports. These reports show that a many different terms are (or were) used in the various countries. Terms are used such as 'actual retroactive', 'formal retroactive', 'true retroactive', 'real retroactive', 'absolute retroactive', 'juridical retroactivity', 'maximal retroactivity', 'retroactive *stricto sensu*', and 'proper retroactivity'; these terms correspond more or less with what is called 'retroactive' in this report. Further, terms are used such as 'non-actual retroactive', 'material retroactive', 'pseudo retroactive', 'unreal retroactivity', 'de facto retroactive', 'relative retroactive', 'improper retroactive' 'medium retroactive', 'false retroactive', 'inappropriate retroactive', 'retroactive in the social sense' and 'economic retroactive'; these terms more or less correspond with what is called 'retrospective' in this report. Moreover, illustrative for the potential misunderstanding is that in Denmark the term 'material retroactive' is used for what in this report is called 'retroactive', while in other countries, if used, the term is usually

5. Bobbett, *supra* note 3, at p. 8 concludes: 'perhaps it would be better to follow the Canadian meaning: restrict retroactive to statutes that alter or do something to the past (Latin: *retroagere* meaning to lead back, to reverse); and use retrospective for statutes that recognise past transactions but alter the consequences of them in the future without changing the past (Latin: *retrospicere* meaning to look back).' See also the Canadian report for the present Canadian use of the concepts of 'retroactivity' and 'retrospectivity'.
6. E.g., ECJ C-376/02, 26 April 2005, case *Stichting Goed Wonen*.
7. Grandfathering means, in short, that the old rule remains (temporarily) applicable to certain situations.
8. As discussed below, a further distinction is made in Canada.
9. Austria, Belgium, Denmark, France, Germany, Hungary, Italy, Luxembourg, the Netherlands, Poland, Portugal, Spain, Sweden, Turkey. However, in Finland only one term (*taannehtivuus*) is used, and in fact only for the phenomenon retroactivity and not for the phenomenon retrospectivity. Furthermore, in Greece in principle only one term is used without making a distinction; it should be noted that although in the Greek literature a distinction is sometimes made between 'true retroactivity' and 'non-true retroactivity', the latter concept does not correspond with 'retrospectivity', but in fact seems to be a special variant of 'retroactivity'.
10. Note that the US reporter remarks that, in the US, a clear distinction between retroactivity and retrospectivity is not usually made, and that the term 'retroactive' is often used to describe both.

used for what is called in this report 'retrospective'.[11] Another example is the use of the term 'non-true retroactivity' in Greece. In the Greek theory of law, the term does not correspond to 'retrospectivity' (as one may expect) but refers to the phenomenon that the legislator 'intervenes' in procedures that are pending for the tax authorities or the courts,[12] which – in the terminology of this general report – is an example of retroactivity.

Finally, we note that although it is conceptually possible to make a distinction between retroactivity and retrospectivity, the difference between these two has less relevance from the viewpoint of legal certainty and of their impact. From these viewpoints, the difference between retroactivity and retrospectivity is mostly considered to be a matter of degree.[13]

1.2.3. **Retrospectivity**

We note that also national reporters of the countries in which the concept 'retroactivity' is distinguished from the concept 'retroactivity' – as described above –, often remark that the concept of 'retrospectivity' is not well-defined or is an 'open concept' or is 'rather vague'.[14]

On the one hand, it appears that some cases of legislation would certainly be called retrospective. In the questionnaire, the example is given of a statute that enters into force on 1 January 2010, and that stipulates that a certain tax exemption is repealed as from that date without the grandfathering of accrued but unrealized gains. As a result, gains that accrued prior to 1 January 2010 but that are realized after that date are not tax exempt either, although they accrued in a period when the exemption applied.[15]

On the other hand, it is hard to provide general criteria to draw a line between retrospectivity of a statute and non-retrospectivity of a statute, taking into account that a new statute generally – unless there is a grandfathering provision – has some influence on future consequences of past events and past transactions. A fine example of the latter issue is provided in the German national report.[16] Noteworthy is that Hungary not only has a broad concept of retrospectivity,[17] but also prohibits retrospectivity. So grandfathering is the main rule in Hungary. Furthermore, in Denmark, legislative practice reveals that retrospectivity ('non-actual retroactivity') is avoided if at all possible (although there is no prohibition of it in the Danish constitution). As a result, transitional rules tend to be extensive and very complicated.

We note that in the literature on legal theory it is generally accepted that it is not possible to make a sharp distinction between retrospectivity and non-retrospectivity. To the contrary, retrospectivity is mostly considered to be a matter of degree. Also, especially the law and economics literature remarks that (almost) any change in tax rules will have an effect on the value of assets and liabilities, and from that point of view is retrospective.

---

11. In Denmark the term 'formal retroactive' is used for the situation in which the tax authorities apply a statute before the statute enters into force. In the Netherlands, the term 'formal retroactive' is used for what is called 'retroactive' in this general report.
12. However, this is not the opinion in the case law of Greek administrative tax courts which consider the legislature's intervention in pending trials to be a case of retroactivity.
13. See in this respect the contribution of Melvin Pauwels in this book, with further references to the literature.
14. Austria, France, Germany, Italy, the Netherlands, Portugal, Sweden.
15. See also the national reports of Denmark, Hungary, the Netherlands and Turkey discussing this (or a comparable) example.
16. Another example is the discussion in Danish legal discourse with respect to the question whether or not in the situation in which new legislation affects 'facta pendentia' (this is legislation that has an effect on continuous events and/or transactions, and as such also covers events that occur partly before and partly after the point of time when the relevant statute comes into effect) the legislation can be characterized as retroactive.
17. For example, if a statute changes the taxation of interest, and would also be applicable to existing loans, this would be considered retrospective.

Further, we note that it may sound appealing to draw the line between retrospective and non-retrospective at whether or not legitimate expectations are infringed by the statute concerned. However, this approach not only mixes up the conceptual question with the question of the legitimacy, it also shifts the issue, namely to the question which standards should be used to assess whether expectations are legitimate or not.

Notwithstanding the above, in some countries a definition of retrospectivity is available. For example, the Belgian reporter provides as definition that a retrospective rule has an immediate effect, which implies that a new legal rule is both applicable to legal facts that occur after the date of entry into force of this new rule, as well as to legal consequences occurring after the date of entry into force, even though these consequences relate to legal facts that took place before this date. In the same line the reporter for Turkey describes retrospectivity as the case in which a new tax provision affects the tax obligations of the taxpayer after the commencement, but prior to the completion, of the taxable event. In Denmark the concept of retrospectivity ('non-actual retroactivity') is related to the situation of 'facta pendentia'; it concerns legislation with an effect on continuous events or transactions. Furthermore, interestingly, in Canada a further distinction is made with respect to what is called in this general report 'retrospective'. In Canada the term 'retrospective' is only used for a statute that changes the future legal consequences of transactions or events that already happened. The term is not used where a statute has immediate effect on current, continuing rights, which situation is considered to fall into a separate category. However, Canadian scholars have observed that it can be exceedingly difficult to distinguish between these two categories.

1.2.4. 'Comparison moment'

Misunderstandings when discussing retroactivity could also arise because of a different use of the 'comparison moment'. That comparison moment is the moment with which comparison is made in order to determine whether a statute has retroactive effect.

Some countries use the date of the entry into force of a statute as the 'comparison moment'.[18] This choice of the comparison moment seems to be related to the fact that, at least in most of these countries, the constitution (or another relevant law) provides that a statute should not enter into force prior to the date of publication.[19] In connection with the date of the entry into force of a statute as the 'comparison moment', legal discourse in most of these countries employs a conceptual difference between the date of entry into force of a statute and the 'effective entrance date' (or a comparable term such as 'date of effect') of a statute.[20] For example, if a tax statute enters into force on 1 December 2009 and states that it is applicable as from the tax year 2010, the effective entrance date is 1 January 2010. Hence, in the approach taken by these countries, in the case of retroactivity, the *date of entry into force* is still a future date, but the *effective entrance date* is a date in the past.

Some other countries use the date of publication of the statute in the government gazette as the comparison moment.[21] It seems that in some of these countries it is possible that the date of entry into force is set at a date of the past.[22] In that case retroactivity could be recognized where the date of entry into force of a statute is set prior to the moment of the publication.

---

18. Belgium, Finland, France, the Netherlands, Spain, Sweden.
19. Belgium, Finland, the Netherlands, Spain, Sweden.
20. Belgium Finland, France, the Netherlands, Spain, Sweden. This distinction is also made in Poland.
21. Denmark, Germany, Greece, Hungary, Luxembourg. Note, however, that in Denmark legal discourse employs a conceptual difference that in outline has similarities with the other approach. In Canada the date of Royal Assent is the comparison moment.
22. For example, Austria.

The different approaches with respect to the comparison moment are not of a great relevance, but only affect the way 'retroactivity' is defined. Theoretically the two approaches could have different results with respect to the label 'retroactivity' in a concrete case, but the appraisal should not differ. For example, a statute that is published in the government gazette on 1 December 2010 enters into force on 1 February 2011, and would be applicable to taxable events that occurred after 1 December 2010 would be called retroactive in the first view but would not be called retroactive in the second view. However, it could be assumed that in the countries in which the first view is used, this retroactive effect would not be regarded as problematic at all from a legal certainty point of view (leaving aside the possible issue of retrospectivity).

1.2.5. 'Tax period-related concept' or 'taxable event-related concept' of retroactivity

A very interesting difference that appears from the national reports concerns the following issue. The issue is whether a tax statute that is enacted during a tax period (for example on 15 November 2010) and is applicable as from the start of that tax period (for example, 1 January 2010) should be characterized as 'retroactive'.

In some countries such a statute would indeed be called retroactive.[23] The basic idea is that such a statute should logically be characterized as retroactive, since the statute is also applicable to a period prior to the date of publication of the statute in the government gazette (or – depending on the comparison moment – the date of entry into force of the statute). Furthermore, the characterization 'retroactive' is considered appropriate because the statute applies to the events (expenses, income earned, transactions, etc.) that occurred prior the date of publication (or the entry into force). One could say that these countries use a 'taxable event-related concept' of retroactivity.

However, there are also many countries in which such a statute would not be considered retroactive but retrospective, at least by the courts.[24] In these countries a statute is only considered retroactive in case a tax statute is applicable to a tax period prior to the period in which the statute is enacted. The basic idea is that the tax obligation of period-related taxes (such as the personal income tax and corporate income tax) only arises at the end of the period, that the tax case therefore is not closed until the end of the period, and that therefore a statute enacted prior to the end of the period is not considered retroactive if it applies as from the start of the period. One could say that these countries have a 'tax period-related concept' of retroactivity.[25]

It is worth mentioning that in the UK the phenomenon that a tax statute is introduced during a tax year and applies as from the beginning of that tax year is even standard practice.[26] This UK practice (however) has to do with the constitutional requirement that, in short, there must be a Finance Act in every year. Also in Canada statutes are regularly intro-

---

23. Denmark, Finland, Hungary, the Netherlands, Poland, Sweden. In Portugal, the issue is still, after the constitutional revision of 1997, under discussion. In Greece the issue is not considered important because retroactivity of tax statutes is constitutionally permitted as long as the retroactivity does not extend beyond the financial year prior to the year of the enactment of the statute.
24. Belgium, France, Germany, Italy, Luxembourg, Spain, Turkey. Noteworthy is that this approach by the German courts has been upheld by the German Constitutional Court in its important decisions of 7 July 2010. In Belgium, until recently, the Supreme Court had even a more far-reaching view (that, however, deviated from the view of the Constitutional Court): according to the Supreme Court, the applicable income tax rules for year x could not only be changed up to 31 December of year x, but even up to 31 December of year x+1 (the assessment year), without being considered (actually) retroactive. The opinion in Canada seems not to be clear; the Canadian reporter notes that it can be argued that such a statute is not retroactive.
25. Cf. the German reporter Hey.
26. In the US as well the practice is common.

duced that are applicable as from the beginning of the tax year. These statutes, however, tend to involve 'annual concepts', like thresholds and personal tax credits, rather than affecting transactions that occurred earlier.

These different approaches are not only of technical relevance. They have also consequences for the substance. As – in most countries – the standards that courts use for retroactivity differ from the standards used for retrospectivity,[27] it could obviously matter significantly whether or not a tax period-related approach of retroactivity is used in case a statute is tested that was enacted during a taxable period and applies as from the beginning of that period.[28] Furthermore, in connection with the latter point, even if courts in two countries were to use the exact same standards to judge retroactivity, the assessment of that statute would differ if in the one country a tax period-related concept of retroactivity is used, while in the other country a taxable event-related concept is used.

Worth mentioning is that some of the national reporters of the countries in which the tax period-related concept of retroactivity is used, note that this concept was developed by the courts, and that the approach is criticized in the literature and by some (lower) courts.[29]

If a tax period-related concept is used, the question arises to which kind of taxes the concept is applicable. Obviously, the concept applies to typical period-related taxes such as the personal income tax and corporate income tax. It is remarkable that the German legislator even considers the inheritance tax to be a period-related tax. Furthermore, it appears that in Germany the value added tax is also regarded as a period-related tax. In Belgium this is not the case.

1.2.6. Interpretative statutes[30]

Another conceptual variation relates to what are known as interpretative statutes. An interpretative statute is a statute that provides for the interpretation of another statute. Similarly, a statute that amends another statute in order to establish a certain interpretation of that statute can also be regarded as an interpretative statute. Interpretative statutes are often applicable as from the (past) entrance date of the interpreted statute. Various issues and questions arise with respect to the temporal effect of such statutes, including the characterization as retroactive.

First of all, it should be noted that, in some countries, the phenomenon 'interpretative statutes' is explicitly recognized as such. Interpretative statutes are considered a special category of statutes. This special status can have a legal basis[31] or can be construed in case

27. Namely that retroactivity is in principle not allowed while retrospectivity is in principle allowed.
28. Note, however, that the German reporter remarks that in July 2010 the German Constitutional Court delivered important judgments. In these judgments the 'tax period-related concept' of retroactivity was again confirmed. However, in these judgments, the court also postulated protection against retrospective changes, which is new. The German reporter notes that, therefore, the difference between the 'tax period-related concept' and the 'taxable event-related concept' of retroactivity will probably lose relevance.
29. Belgium and Germany.
30. See on this topic the contribution of Bruno Peeters and Patricia Popelier in this book.
31. Belgium and Luxembourg: in the Constitution; Italy (*legge di interpretazione autentica*): not in the constitution but in the civil code and the statute of taxpayer's rights; Spain has interpretative ministerial orders, which have a legal basis in the General Tax act.; United Kingdom: the Interpretation Act 1968 (which is a general Act of Parliament). Canada has the Interpretation Act. This act provides for, amongst other things, transitional rules with respect to the effects of legislative repeal and amendment; one of the provisions (paragraph 44(f)) of this act seems to have an effect that corresponds to an interpretative statute. Greece takes a special position in this respect. Interpretative statutes have a legal basis in the Constitution (referring to the 'authentic interpretation' that rests with the legislative power). However, as concerns tax statutes, the prevailing opinion is that, because of a constitutional provision with respect to retroactivity of tax statutes in general, tax interpretative statutes only have retroactive effect that does not extend beyond the financial year prior to the year of the enactment of the statute.

law.[32] In other countries 'interpretative statutes' are not explicitly recognized as a special category.[33] However, the national reports show that, nevertheless, the national legislators of some of the latter countries sometimes also grant retroactive effect to a statute, justifying the retroactivity by claiming that the statute only provides for a clarification of the interpretation of another statute.[34] In a few countries, however, retroactive interpretative statutes are (nearly) unknown or are considered invalid.[35] To conclude, most of the countries are in some way familiar with the phenomenon of retroactive interpretative statutes.

Secondly, the question arises whether, if an interpretative statute is applicable as from the past entrance date of the interpreted statute, the interpretative statute would be considered 'retroactive'. In most of the countries in which the law does not explicitly recognize 'interpretative statutes' as such, the answer to that question is positive: the statute would in general indeed be considered retroactive.[36] The question, however, is especially interesting with respect to countries in which 'interpretative statutes' are a special category. In some of these countries the statute would not be considered retroactive.[37] The basic idea is that the interpretative statute is supposed not to bring anything new to the interpreted statute. However, in other of these countries the term 'retroactive' is used, although distinguished from 'pure' retroactivity.[38]

Thirdly, the question arises whether the retroactivity of interpretative statutes is assessed in a different way from retroactivity of other statutes. This question is usually interrelated with the question what standards are used to distinguish an interpretative statute from a non-interpretative statute. Both questions are interesting especially, but not only, with respect to the countries in which the phenomenon 'interpretative statutes' is recognized as such in the law.

To start with the second question, theoretically two approaches can be distinguished. The first approach is – what we would like to call – the formal approach. In that approach a statute is considered interpretative if the legislator has labelled it 'interpretative'. Thus, the courts do not assess whether such a statute is really interpretative.[39] On the same lines, in some countries, the courts will, as a rule, give effect to the will of parliament if an interpretative statute is introduced.[40]

The second approach is – what we would like to call – the substantive approach. In this approach the national court assesses by means of certain standards whether a statute that is labelled interpretative by the legislator indeed can be characterized as interpretative. It could obviously be the case that a national legislator wrongly labelled a statute as 'interpretative'.[41] In most of the countries basically the second approach is taken.[42]

The subsequent issue is how to determine whether a statute is indeed interpretative. It seems that different standards are used. It is reported that an interpretative statute should not have new legal content.[43] Then the question remains when a statute is considered to

32. France (*loi interprétative*).
33. Austria, Denmark, Finland, Germany, Hungary, the Netherlands, Poland, Sweden, Turkey, the USA.
34. Austria, Canada, Germany (*Klarstellungsinteresse*), the Netherlands, and the USA ('technical corrections' and 'restatement of intended meaning').
35. Hungary, Poland, Sweden, Turkey.
36. Denmark, Finland, Germany, the Netherlands.
37. France, Luxembourg.
38. Belgium.
39. This is approach seems to be followed by the Supreme Administrative Court (*Council d'Etat*) in France.
40. Canada, United Kingdom.
41. In French legal discourse the term 'falsely interpretative statute' (*loi faussement interpretative*) is used. In Greece the terms 'not truly interpretative' and 'pseudo-interpretative statute' are used.
42. Belgium, Greece, and also the Supreme Court (*Cour de cassation*) in France.
43. National reports of Austria, France and Italy.

have new legal content. The issue is deeply intermingled with the issue of interpretation methods.[44] In Germany, an interpretative statute is considered interpretative if it stays within the interpretation limits of the statute to which the interpretative statute applies. This is even the case if the interpretation provided for by the interpretative statute deviates from the interpretation that the Supreme Court gave or might give.[45] Some other countries, however, seem to have a more strict view on interpretative statutes. For example, in Belgium it is the case that the interpreted legal provision, from its origin, could not possibly be comprehended in a way different from what was indicated in the interpretative law. If a statute that is labelled interpretative by the Belgian legislator does not meet this requirement, the retroactivity of the statute will be judged by the courts on the basis of the standards for retroactivity of 'normal' statutes. In Greece an important issue is whether the interpreted statute was indeed unclear; if that is not the case the interpretative statute is not considered truly interpretative. More or less the same applies for Italy, in which the standards are that there should be uncertainty, unclearness of the interpreted statute, different or contrasting interpretations by the courts or by the tax authorities. In Austria it is not regarded a problem that the interpretative statute confirms the view of the tax authorities, while some taxpayers have a defensibly different interpretation of the interpreted statute.[46] The ratio is that if there are different defensible interpretations, the taxpayer cannot trust a certain interpretation.

With respect to the first question, we note that in the above-mentioned countries in which an interpretative statute that is applicable to the past is not considered retroactive, the standards for 'retroactivity' of interpretative statutes are obviously different from those for retroactivity of other statutes. Some other countries provide a fine illustration of the interrelation between the first question and the second question. For example, in Belgium the standards for retroactivity of interpretative statutes are lower than for retroactivity of other statutes, but there is – as just seen – a strict view of the definition of an interpretative statute. In some countries in which interpretative statutes are not recognized as such, in principle no explicit different standards are used to evaluate retroactive interpretative statutes.[47] Obviously, if the interpretation provided is the same as the interpretation that the courts would give if the interpretative statute had not been enacted, the retroactivity is not a problem.

In various national reports it is explicitly noted that regularly statutes that are labelled interpretative by the legislator or as only a clarification are not really interpretative or, as the case may be, more than a clarification.[48] Furthermore, it is even noted that 'it has been common practice throughout the last 100 years that [government] uses an act of parliament to reverse the effect of a court decision or to remove a doubt about interpretation in favour of the official view.'[49]

1.2.7. **Validation statutes**[50]

An interesting phenomenon is the retroactivity of what are known as validation statutes. Such a statute 'validates' an existing legal practice and/or a certain view of, often, the tax authorities. The various national reports show that most of the countries are familiar with

44. Cf. German national report.
45. Germany.
46. This also seems to be the case in Belgian.
47. Canada, Denmark.
48. Canada, Germany, Italy.
49. National report of the United Kingdom.
50. See on this topic the contribution of Bruno Peeters and Patricia Popelier in this book.

the fact that the tax legislator sometimes introduces a statute with retroactive effect to validate an existing legal practice and/or a certain view of the tax authorities.[51] In some countries, however, retroactive validation statutes are (nearly) unknown or would be considered invalid.[52]

Three types of situation can be distinguished. A first type is that the validation statute is enacted at a moment that the courts have not yet decided whether or not the existing legal practice and/or the view of the tax authorities has sufficient legal basis in the law, i.e. is valid.[53] Sometimes the legislator then argues that the statute only provides a clarification of the existing law. We note that there could be a conceptual overlap with the phenomenon of interpretative statutes, described above, in case the statute 'validates' an interpretation.

A second type concerns the situation where the legislature acknowledges that a certain tax practice has no legal basis, and introduces a validation statute that is explicitly intended by the legislature to provide for a validation, i.e. a legal basis for that practice.[54]

The third type is that the validation statute is enacted further to a decision of a court in which the legal practice or the view concerned is rejected because it has no legal basis in the law or another view should be regarded as the correct one.[55] Especially where a court decision reveals there is a 'gap' in the tax law, the legislator may enact a validation statute with retroactive effect. In this second type the national authorities often first announce to the public, e.g. by press release or a circular, that a validation statute will be introduced, in order to avoid taxpayers developing confidence in the court's decision concerned.

In some reports the retroactivity of validation statutes is criticized especially with respect to the second or third type of situation.[56]

1.2.8. The relevance of the character of the statute concerned: procedural or substantive

Case law of the European courts, the ECJ as well as the ECtHR, shows that in order to determine the temporal effect of a statute the character of the statute is relevant. A *substantive* statute that has immediate effect applies to taxable events occurring after the date on which the statute enters into force. However, a *procedural* statute that has immediate effect is directly applicable to pending proceedings (so also to proceedings regarding taxable events that occurred prior to the date on which the statute enters into force).

For example in the (tax) case ECJ C-61/98 (*De Haan*), the ECJ ruled: 'it should be noted (…) that (…) procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force." The ECtHR takes a similar approach.[57]

---

51. Belgium, Canada, Germany, France (*loi de validation*), Italy (*convalida legislativa*), the Netherlands, Spain, Sweden, the United Kingdom, the US.
52. Finland, Greece (nowadays), Luxembourg, Hungary, Poland, Portugal, Sweden, Turkey. A middle position seems to be the case in Denmark: if granted retroactive effect, a 'validation statute' would normally not be granted further retroactive effect than on the date on which the bill is introduced to parliament.
53. The French reporter call this 'indirect validation'. This technique has the aim 'to change the law applicable to a dispute pending before a court in order to prevent the annulment of the decision.'
54. This is considered a true validation statute (*loi de validation*) in France.
55. E.g. Belgium, Canada ('remedial retroactive tax legislation'), Germany (*Nichtanwendungsgesetze*), Italy, the Netherlands.
56. E.g. the national reports of Germany, Italy ('abuse of judicial activity').
57. E.g. (the non-tax case) ECtHR No. 26737/95, 19 December 1997, case *Brualla Gomez*, para. 35 refers to ''a generally recognised principle that, save where expressly provided to the contrary, procedural rules apply immediately to proceedings that are under way."

Analysis of the various national reports shows that the above generally also applies in most of the countries,[58] however not in all countries.[59] A variant is that procedural rules do not apply to procedures initiated before the date the statute enters into force.[60] Note that also in this variant the new procedural rule does apply to the (new) procedures that relate to tax events that occurred in the past.

Thus, in principle, new procedural rules also apply to new, and often also pending, proceedings even if the matter of the proceeding is a taxable event that occurred prior to the date on which the statute enters into force. An exception, mentioned in most of the national reports, is the case in which the new procedural statute contains a transitional provision that states differently.

Furthermore, some of the national reports mention more specific exceptions. The immediate effect of a procedural rule may be limited to the extent that a new procedural rule cannot stipulate duties to cooperate for the past, based on the principle that a law may not impose an impossible obligation.[61] Also, sometimes, some rules of evidence or burden of proof will not be given immediate effect.[62] More in general the critical issue is raised that, from the perspective of taxpayers' rights, it is not always possible to differentiate between procedural and substantive rules.[63]

1.3. Ex ante evaluation of retroactivity

1.3.1. Limitations to retroactivity of tax statutes

Retroactive tax legislation is a commonly known phenomenon in the countries referred to in this general report. In the United Kingdom, Parliament has the power to enact by statute any fiscal law, retroactive tax laws included. In Canada, there are no constitutional limitations on retroactive taxation which means that it is legislative self-restraint that determines the frequency and extent of retroactive tax measures. In the other countries, however, there are (constitutional) limitations to the retroactivity of tax statutes.

Portugal and Sweden have a constitutional provision prohibiting retroactive tax laws. In Portugal, this constitutional provision is quite strictly applied. However, in Sweden the constitutional prohibition turns out to be a limitation, rather than a strict prohibition.[64] On the other hand, there are countries which are quite strict on retroactivity due to the (constitutional) courts. In Hungary and Poland, the constitutional courts developed quite a strict prohibition based on constitutional principles.[65]

Limitations may partially be absolute, turning out to be an absolute prohibition of retroactivity but only with a regard to a specific kind of legislation. This is the case in France with respect to the binding force of a judicial decision.

---

58. Austria, Belgium, Canada, France, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands, Poland, Portugal, Sweden, Turkey, United Kingdom.
59. Finland and the US. The Danish report notes that Danish legal theory as well as case law is not consistent with respect to procedural statutes at this issue.
60. Spain.
61. Germany.
62. France, Sweden.
63. E.g. the national reports of Greece, Hungary Italy, and Luxembourg.
64. Nonetheless, this is a strong prohibition. There is a communications procedure introduced as an instrument for parliament to legislate retroactively in certain situations, but this procedure has been created to maintain the rule of law in situations where rapid changes in tax law are motivated by strong public interests.
65. The principle of the rule of law and the principle of the democratic state under the rule of law, respectively.

In practice, therefore, in almost none of the participating countries does there exist an absolute ban on retroactive tax legislation, though in countries like Poland, Portugal and Hungary (through the court) a near prohibition exists, at least with regard to retroactive tax legislation which is unfavourable for taxpayers. Furthermore, the existing limitations are a matter of degree. Though (constitutional) limitations have a *prima facie* force, other reasons may have more force. Therefore, the force of the limitations to retroactivity have to be weighed against reasons pro, for example, grounds of general interest. See further section 1.5 on ex post evaluation (case law).

With regard to the legal source of the limitations to retroactive tax legislation there seem to be five variants. Sometimes different variants are present in one and the same country. Note that these variants concern tax statutes, not hierarchically lower tax rules.

The following variants may be distinguished.

- the limitations are derived from a general principle that is laid down in the constitution or in a constitutional text, e.g., the principle of legality, the principle of fairness, the principle of legal certainty, the principle of legitimate expectations, the principle of equality, the principle of the rule of law, the ability-to-pay principle, and the protection of property, personal freedoms, democratic state under the rule of law.[66]
- the limitations are explicitly laid down in a general provision, not only regarding tax statutes. This variant may be possible in theory, but does not occur in any of the countries under examination.[67]
- the limitations are explicitly laid down in a constitutional provision that specifically regards taxation.This variant occurs in Greece, Article 78. Para. 2 of the Constitution of Greece;[68] Portugal, Article 103, no. 3 of the Portuguese Constitution; Sweden, Article 2:10 of the Instrument of Government.
- the limitations are derived from an unwritten general principle of law; such as the principle of legal certainty, the principle of equality, the principle of legitimate expectations, the principle of equality, the principle of the rule of law.[69]
- the limitations are laid down in a non-tax law which is applicable to tax statutes, and reflect a general principle of law. This is the case in Belgium, Art. 2 of the Civil Code, and Luxemburg, also laid down in the Civil Code.

---

66. Austria, Belgium, equality; Finland, a constitutional principle of 'avoidance' of retroactive tax legislation; France, the necessity of 'guaranteeing rights' and of the separation of powers (respect of the binding force of a judicial decision); Germany, the rule of law; Greece, the principle of equality (with regard to tax abatements); Hungary, the principle of the rule of law; Italy, the ability-to-pay principle, and the principle of legitimate expectations (derived from the principle of equality); Poland, democratic state under the rule of law; Spain, the principle of legal certainty; Turkey, the principle of the rule of law; USA, the Fifth Amendment to the American Constitution ('No person shall be … deprived of life, liberty, or property without due process of law') and the contract clause.
67. Many constitutions contain a prohibition of retroactivity for criminal law, see e.g. Belgium, Canada, Germany, Greece, the Netherlands, Turkey, USA. Consequently, retroactivity of the more severe tax penal statutes may be absolutely prohibited. Interestingly, the Greek Council of State does not apply the constitutional prohibition of retroactivity for criminal law in the case of tax penal statutes even in the case of the more severe ones. However, in its recent case law of the last five years it applies Art. 7, para. 1 ECHR on tax fines.
68. Greece has a constitutional provision prohibiting the unfavourable retroactive tax law if this tax law is effective prior to the fiscal year preceding the imposition of the tax. Furthermore, the Greek Constitution (Art. 78, para. 3) establishes that it is possible to collect consumer taxes and duties from the date on which a relevant bill is introduced in parliament, i.e., before the bill is put to the vote, as long as a time-limit for the promulgation of the law imposed by the Constitution is observed.
69. Examples of this variant with regard to the principle of legal certainty are Belgium, Denmark and the Netherlands. In Denmark, several other principles are at stake: the principle of legitimate expectations, the principle of equality, the principle of the rule of law, and the ability-to-pay principle.

1.3.2. **Transition policy**

Besides the constitutional and legal factors just mentioned, there are also 'informal' limitations. The legislator may formulate rules which set boundaries to the use of retroactive legislation (self-binding). Thus, the legislator may offer taxpayers guidance with regard to the use of the instrument of retroactive tax legislation. This is quite an exceptional situation. Some guidance may be offered by a parliamentary committee, as is the case in Finland, where lines are set by the standing Constitutional Law Committee.

A single country has an explicit 'transition policy' in the field of tax statutes, viz. the Netherlands. In his capacity of co-legislator, the Netherlands State Secretary of Finance has published (and discussed with parliament) a memorandum that incorporates the main lines of his 'transition policy' with respect to the introduction of tax statutes. The memorandum is not legally binding – it is a soft law instrument –, but it has some influence in the parliamentary debate, for example, in the event that a bill includes retroactive effect. The memorandum (also) contains policy guidelines with respect to granting retroactive effect to statutes and grandfathering.[70] In Canada the Department of Finance published a list of self-imposed restrictions on the use of retroactive tax legislation in a document issued in 1995 (the 'Finance Report') which – only – sets guidelines for the use of retroactive tax measures to clarify or correct an unintended interpretation of a tax provision by a court.

In other countries, less guidance is offered by government. Governments may have a general policy with regard to the quality of legislation, which also covers tax legislation, for example Denmark. However, this general legislative policy does not include a transition policy. Sometimes a general legislative policy concerns not the national but a regional level. For example, the Flemish region in Belgium played a pioneering role in developing a general legislation policy concerning the quality of tax legislation.

The German national reporter notes that there are neither official nor unofficial guidelines on the tax transition policy. The Ministry of Finance, who is drafting the tax bills in Germany, decides case by case. Sometimes a certain regularity may be apparent in the situations in which government provides for transitional rules, as is the case in Austria. It is very well possible that this regularity indicates a transition policy. Sweden reports that, it may be possible to derive an implicit governmental policy from the preparatory works – although a transition policy for legislation (tax legislation included) is lacking. In November 2004 the French government pledged to stop using retroactive provisions detrimental to the taxpayer. However, it is difficult to ascertain whether it marks a major change in legislative practice.

Furthermore, there may be 'rules of legislative technique' which also regulate the issues concerning transitional provisions. In Poland, these are rules of a technical character: recommendations as to the language of a statute, typical terms of a legislative language, layout of a normative act, etc.

Of course, a (constitutional) court may develop an (implicit) policy on the possibility of retrospective legislation with particular regard to retroactivity. Consequently, the tax legislator may be careful not to transgress the boundaries set by the court (infra, section 1.4).

---

70. The memorandum sets out as the starting points of tax transition policy that in principle no retroactive effect will be granted to statutes and that statutes in principle will have immediate effect (without grandfathering). Furthermore, the question whether or not (formal) retroactivity is justified is regarded a question of the balancing of interests: on the one hand, legal certainty of the individual taxpayers concerned and, on the other hand, the interests of society as a whole that are served by granting retroactive effect to the statute concerned. Whether or not retroactivity in a concrete case is justified depends on the circumstances of the case. However, two elements are distinguished: whether or not a justification exists for granting retroactive effect ('the substantive element') and the period of retroactivity (the 'timing element').

With regard to retroactive tax statutes that are favourable to taxpayers, these are generally not regarded problematic (e.g. Denmark and Luxembourg). Finland does not raise a question of retroactivity from the constitutional point of view and there is a policy, although not expressly stated. As for the Netherlands, the above-mentioned general memorandum of the State Secretary of Finance does not pay any attention to this topic.

1.3.3. **Ex ante control by an independent body**

Part of the legislative process may be the consultation of formal bodies which give their opinion on the quality of draft legislation, retroactivity included. However, an independent body applying any set of rules on an ex ante basis to review negative retroactivity, favourable retroactivity, retrospectivity, or grandfathering in tax legislation is by no means universal, as the examples of Austria and Canada show.[71] In many countries, though, a formal institution exists which reviews or advises on (draft) legislation.

This body may be another ministry, for example the Ministry of Justice, which reviews all bills.[72] Another variant is that consultative committees, such as a Council of State,[73] Council on Legislation,[74] or a court could (or even, should) be asked for – non-binding – advice.[75] However, the competence of such formal body may be limited, as is the case in Greece, where the Council of State has no consultative competence on substantive tax elements.[76]

Apart from these formal bodies, still other consultative committees may play an important role in the legislative decision procedure. This is the case in, for example, Greece which has a Court of Auditors.[77] Another example is Belgium, without there being specific formal advisory or consultative obligations for fiscal matters.

Finally, there may be a (parliamentary) standing committee for constitutional law, which examines a statute for compliance with the constitution before it is enacted.

The ex ante control by an independent body may be of a legal-technical nature or of a substantive nature. In Denmark, for example, the review by the Ministry of Justice is partly of a legal-technical nature, but also includes constitutional principles, EU law and retroactivity.[78]

The Belgian Council of State gives judicial, linguistic and legislative advice about draft decrees, preliminary bills and proposals of law, decree or ordinance as well as amendments concerning these.

The publication of the criteria for good legislation applied in the review process would enhance its transparency. However, these criteria are often not published. The Danish Ministry of Justice, for example, has not laid down explicit rules concerning this review.

---

71. Nonetheless, the Canadian Senate might ask the House of Commons to adjust the effective date of a tax amendment, but in practice the Senate never does this. It is also possible for the executive to issue a "reference" to the Supreme Court of Canada regarding proposed legislation, although this process never occurs with respect to the proposed retroactivity of tax laws.
72. In Denmark, for example, all ministerial bills pass a consultation process that includes a review by the Ministry of Justice.
73. E.g. Belgium, France, Greece, Luxembourg, the Netherlands.
74. In Sweden government is in principle obliged to remit major items of draft legislation to the Council on Legislation, composed of members of the Supreme Court and the Supreme Administrative Court.
75. In Turkey the Supreme Administrative Court has advisory competence with regard to draft legislation in general, but this court has not advised in tax matters yet.
76. Substantive tax elements are established only by act of parliament, for which the Greek Council of State has no consultative competence.
77. Although the consultative competence of the Greek Court of Auditors does not regard tax bills, but pension law bills only.
78. Moreover, the bills' wording is also examined for precision and potential vagueness.

Rules may also not be known because the advice of this institution, which possibly may contain rules, is not published, as is the case with the advice of the French Council of State.

Even if criteria or rules are published, these may be general rules, which apply to all kinds of legislation. This goes for Sweden, which has no particular rules regarding tax legislation.

Also with regard to retroactivity itself, criteria or rules may be published which do not specifically concern tax statutes, but are of a general nature. The website of the Belgian Council of State, for example, uses a manual with recommendations published on its website. This manual also contains observations regarding retroactivity. Yet these observations do not specifically concern tax statutes, but are of a general nature. The manual states that, in general, legislative and administrative rules do not have retroactive effect. For retroactivity to be justified, certain conditions have to be met.

In the Netherlands, on the other hand, the Council of State has laid down criteria with respect to the question of when, in its opinion, granting retroactive effect to tax statutes is allowed. This Council of State uses these rules to review whether exceptional circumstances justify (formal) retroactivity that is disadvantageous for the taxpayers, with respect to the period of retroactivity, and whether or not grandfathering is necessary.

1.4. Use of retroactivity in legislative practice

1.4.1. 'Legislation by press release'

The legislator often announces envisaged changes of tax legislation. Sometimes, it also proposes retroactivity till the date of the announcement. In this respect, for example, it may use the instrument of 'legislating by press release':[79] it is announced in a press release that a bill is (or will be) proposed in parliament and that the bill provides for retroactivity till the date of the press release. Such a press release, which makes an envisaged change of tax legislation known to the public at large, is a particular kind of announcement. An official announcement may also be found in the parliamentary proceedings, for example with regard to a bill, a motion or an amendment.[80] Typically, here the temporal reach of the retroactivity of the tax act is connected to the date of the announcement.

As will be shown below, there are several variants. The general idea, however, is that, on the one hand, there is some kind of an announcement allowing taxpayers to adjust their expectations, and rely with reasonable certainty on what the law will be (legal certainty of taxpayers), and, on the other hand, retroactivity is applied till the date of the announcement (the timing element).

Of course, press releases are often used to announce cabinet decisions to put forward a bill or legislator's acceptance of a bill.[81] The bulk of the tax changes is often be introduced in the annual budget. Then, tax enactments may be made effective from the date of the annual budget announcement, as is the case in Canada.[82] In Sweden there is even a general obligation to communicate a proposal concerning retroactive tax legislation.[83] These press releases, however, are not used for setting the date as from which the new law will be

79. For an example, see the disputed retroactivity in ECJ C-376/02, *Stichting Goed Wonen II.*
80. In the Netherlands a bill only is published after the advice of the Council of State. In this constitutional context, a press release, for example published on the date the bill is brought before parliament (and sent to the Council of State for advice), is an instrument to inform the public of intended changes of legislation.
81. In the Netherlands press releases in tax matters are issued by a single member of government, the State Secretary of Finance, regularly after consultation of the Council of Ministers.
82. In Canada it is less common for changes to be announced by press releases, which do not have the constitutional formality or public exposure of annual budgets.
83. This is normally done through a press release or even a press conference.

applied. Thus, press releases, occasionally with respect to envisioned tax policy changes, are purely used for information purposes without any legal consequences attached to them (see for example Luxembourg and Turkey).

The legislative technique of 'legislation by press release' is not used in all countries in tax matters, as the reports from Austria, Denmark,[84] Greece, Hungary, Luxembourg, Poland, and Portugal show. In some countries, for example Hungary and Poland, the constitutional court acts as a blockade to 'legislation by press release.'

This use of this legislative technique may cause different degrees or intensities of retroactivity. This degree or intensity of retroactivity depends on the amount of time between the press release or announcement, i.e. the date till which retroactivity is applied, and the publication in the government gazette.

1.4.2. **Kinds of situation**

There are several variants. In the Netherlands, it happens that a press release announces that a bill will be proposed in parliament and that the bill provides for retroactivity till the date of the press release. Less far reaching is the situation in which it is announced in a press release that new tax legislation will be applied as from the date of the press release following the session of the Council of Ministers that has decided to propose a certain tax measure to be voted by parliament (for example, Belgium, Finland, the Netherlands and Sweden). Belgium also offers an example for another variant of this technique: the entry into force as from the date upon which the decision to enact the new legislation was published in the Belgian Official Gazette. In Spain, retroactivity is permitted back to the date of the publication of the draft retroactive provisions in the parliament's official journal. In the USA, Congress will frequently use a date prior to the enactment date of legislation as the limit of the extent to which the substantive provisions will be retroactively applied. Various dates may be used, including a date connected to an administrative pronouncement, or a date with significance in the legislative process including a presidential budget message, a committee announcement or press release, the release of a committee report and the date a conference agreement is reached. All these events may in some way be announced, for example by press release.[85]

Legislation by announcements, for example, a press release, pushes aside the legal certainty provided by the rule of law requirement of formal promulgation of new statutes in the constitutionally provided organ of publication.[86] Taxpayers are required to take note of an emerging new statute by other sources, which do not have the same reliability, as the constitutionally provided official gazette. No wonder that in many countries this practice gives rise to serious scholarly debate.

A justification may be found in cases of anti-abuse legislation or in cases where government wants to prevent what is known as the announcement effect, i.e. the situation where taxpayers, as soon as they become aware of future changes in legislation, take certain actions, make use of a loophole, which will undermine the effect of the legislation.

---

84. Promulgation by press release (and other media, such as radio and TV) has occurred in Denmark, but not in connection with tax statutes. Retroactivity by press release, on the other hand, is very uncommon in Denmark other than in legislation in connection with collective agreement negotiations that break down and result in strikes.
85. Canada reports that there are many situations where a tax enactment might be made effective from the date of a press release rather than the more customary budget announcement, thus avoiding the government going through the more onerous budget process. Apparently, this method is used whenever the Department of Finance feels it is appropriate.
86. The one exception is the situation that the announcement and the formal publication of an approved bill, i.e. new statute, in the constitutionally provided organ of publication bear the same date.

In most countries it is hardly possible to classify the types of case in which the instrument of 'legislation by press release' is used. Such an announcement is likely to be used in various types of tax and other legislation, as the US report points out. In France, 'legislation by press release' is used for new tax incentives, in order to get effects of from the date of the announcement. With regard to the Netherlands, however, there are roughly two types of situation in which the instrument is used. The first is that the new statute is aimed at (existing or expected) abuse or improper use of tax rules. The second type of situation is that an existing favourable tax policy rule is changed or withdrawn, for example, a fiscal subsidy.

1.4.3. Retroactive period further back than the date of announcement

In exceptional cases the retroactive period of tax legislation reaches further back in time than the date of the announcement.[87] This occurrence may be related to a certain technique of retroactive legislation, for example validation statutes. In countries in which validation statutes occur, such as Belgium, France, the Netherlands and Turkey (supra, section 1.1 'Terminology') the retroactive period of tax legislation sometimes reaches further back in time than the date of the announcement. This also holds for cases where the legislator uses interpretative statutes.

It may also be the case that media reports, instead of an official press release, inform the general public, thus weakening the trust of the taxpayers (Germany).

Of course, a (constitutional) prohibition of retroactivity may rule out this possibility of retroactivity which reaches further back in time than the date of the announcement, as is the case in, for example, Portugal. In other countries, although a constitutional prohibition is lacking, this far-reaching form of retroactivity is rarely used.[88]

Note, however, that in several countries a (constitutional) temporal limitation exists as a consequence of which retroactivity which reaches further back in time than the date of the announcement is not banned. According to the Constitution of Greece, for example, retroactivity is permitted which does not extend beyond the fiscal year prior to the year of publication of the law. In Finland there also is a limitation: retroactivity may reach back to the beginning of the fiscal year. Obviously, this also holds for countries with a taxable period-related concept (supra, section 1.1 'Terminology').

There may be reasons for retroactivity which reaches further back in time than the date of the press release. These reasons may also occur in combination:

- public interest because of the risk of serious announcement effects (Belgium & Germany), possibly in conjunction with the degree of legal uncertainty for the taxpayers (Spain);
- tax avoidance or more broadly the elimination of a loophole (Canada,[89] the Netherlands, USA);
- correction of technical errors and omissions in prior legislation (Canada[90], the Netherlands, USA);
- inadvertently created hardships or benefits (USA);
- obvious (substantive) omissions and errors (the Netherlands);
- unfavourable judicial decisions (Canada), for example those with drastic negative budgetary consequences (the Netherlands).

---

87. E.g. Belgium, France, Germany, the Netherlands, Spain, Sweden, USA.
88. E.g. Denmark, Finland, Poland.
89. To prohibit a particular tax avoidance strategy the Canadian legislator here uses remedial retroactive tax legislation, to 'clarify' a tax provision. The same strategy may be applied to 'overrule' an unfavourable judicial decision (see below).
90. Canada calls these kinds of errors neutral, corrective amendments, such as those that fix numbering, cross-referencing, and linguistic errors.

1.4.4. **Pending legal proceedings**

1.4.4.1. *Influence of retroactive tax statutes*

Retroactive effect granted to substantive statutes may influence pending legal proceedings, even though it may take much time for disputed issues to move through the objection and appeal process.

In some countries such as France, this often happens and it is frequently the explicit aim of the statute. This is occurs especially in cases of validation statutes. The same goes for Germany, where more generally, a statute which is enacted with unlimited retroactivity applies to any pending procedure. Pending cases are normally not excluded from the application of the new statute.

The USA reports that there is no established modern practice for Congress, but early cases allowed Congress to affect the outcome in pending cases through the enactment of retroactive legislation.

In the United Kingdom this sometimes happens, but not very frequently. In the same vein, Canada, where it can occur where there are long delays between the announcement and the enactment of legislation; in such cases the litigants are bound by the amended law.[91]

In Sweden retroactivity is generally not a problem since pending legal proceedings concern, with the exception of advance rulings, transactions already carried out. This way, legislation enacted (or a communication submitted) could not be applicable to a pending case. However, an advance ruling is based on the legislation in force when the ruling is given. If the legislation is changed before the transactions are made, the latter legislation is applicable and the advance ruling does not detract from that legislation.

1.4.4.2. *Pending legal proceedings excluded from application of retroactivity?*

In some countries, such as Canada and the Netherlands, there is no explicit prohibition in this respect. In the Netherlands, however, because most of the cases of retroactivity of legislation concern 'legislation by press release' the retroactive effect does not normally have the effect that pending legal proceedings are influenced. The same goes for Sweden; normally it is not a practical problem since retroactivity is generally not granted for more than perhaps a couple of months – not years.

In some countries pending legal proceedings are excluded from the application of the new statute, for example Denmark[92], Hungary, Italy, Portugal (because of the general non-retroactivity in tax matters). In Finland it is a merely theoretical situation, for retroactive effect is granted very seldom and in those cases the legislator acts fast.

In Greece pending cases may be affected only by explicit provision, and, in any case, within the limited time frame set by the constitution which expressly permits retroactivity as long as the latter does not extend beyond the financial year prior to the year of enactment of the law.

Spain reports that, in principle, pending legal proceedings are excluded from the application of the new statute, so there seems to be some latitude for the legislator.

---

91. Although it is unclear to what extent legislation that is retroactive prior to announcement can affect pending legal proceedings that turn on substantive issues which arose years in the past (but after the effective date).
92. In Denmark it is commonly accepted that amendment of procedural statutes has effect on pending legal cases unless otherwise stated in the amendment's transitional provisions. As a rule, however, procedural legislation will contain transitional provisions.

The same goes for Belgium: in principle, pending legal proceedings are excluded from the scope of a new substantive statute. If this occasionally happens, however, strict conditions have to be met.

1.4.5. Retroactivity favourable to taxpayers

The legislator sometimes grants retroactive effect to tax statutes that are favourable to taxpayers. However, in some countries this does not happen, an example being Belgium.

In other countries, such as Hungary and Greece, granting such favourable retroactive effect to tax statutes is possible, but it does occur only in very exceptional cases, and, especially in Greece, only if the constitutional principles of tax equality and of separation of powers (and res judicata) are not infringed. Germany reports that, although the legislator is free to grant this kind of retroactive effects to tax statutes, favourable changes with retroactive effect are rather rare. One of the reasons for this might be to compensate for a long-lasting political debate or a protracted legislative procedure. In Turkey this type of retroactivity occurs, whereas the principle of equality sets limits to the measure concerned (although there is some scholarly debate on this issue). Spain reports that this kind of retroactivity only applies to administrative penalties, surcharges and, occasionally, to late interest and special cases of tax liability.

Still other countries report a more frequent use of favourable changes with retroactive effect. In Austria, Canada and the United Kingdom it is not uncommon. In France it happens frequently, in cases of 'legislation by press release', and in Italy it is generally permitted

The Netherlands legislator regularly grants retroactive effect to tax statutes that are favourable to taxpayers, seemingly mostly in situations in which the field of application *ratione materiae* of a provision has a different scope than expected and intended.
The USA reports that such effects are common when, as part of the income tax, Congress enacts "extender" legislation after a provision that was subject to sunset has expired.
As for the kind of situation in which this kind of favourable retroactivity is granted, there often is no specific pattern, as Danish reporter states, the decisive factor being a political desire to favour taxpayers retroactively. On the other hand, in Finland a tax relief is considered a typical situation.

1.5. Ex post evaluation of retroactivity; case law on retroactivity

1.5.1. Introduction

If the legislator introduces a tax statute with retroactive effect that is disadvantageous for taxpayers, taxpayers may appeal to court to challenge the retroactivity. Whether or not such a challenge would be successful depends on (i) the possibilities the courts have to test retroactivity, (ii) on the standards that the court uses to assess whether or not the retroactivity concerned is legitimate, and of course, (iii) on the legislator's reasons for the retroactivity at hand. In this section, we deal with the first two aspects. In principle, courts would have the following the possibilities to test retroactivity:

- testing against the national constitution;
- testing against general principles of law;
- testing for compatibility with international treaties.

There may be an overlap between these possibilities. The principle of legal certainty is a fine example. This principle is, in the first place, a general principle of law. The principle may, however, also be enshrined in the constitution (or courts may derive the principle from another general principle enshrined in the constitution). Furthermore, the principle of legal certainty is also relevant when testing of retroactivity for compatibility with international treaties. First of all, according to settled case law of the ECJ, the principle of legal

certainty and the principle of legitimate expectations are characterized as general principles of EU law.[93] Secondly, although the principle is not explicitly laid down in the European Convention on Human Rights, the European Court has ruled that the principle of legal certainty is necessarily inherent in the law of the Convention.[94] As such, the principle plays a role in the case law of the European Court with respect to, for example, Article 6 ECHR and Article 1 of the First Protocol ECHR.

1.5.2. **Possibilities and limitations to test retroactivity**

Not all the above-mentioned three possibilities may be available for national courts. The courts' competence may be limited, for example by the constitution. In this respect the nature of the tax statute concerned may also be relevant.

In most countries the courts are allowed to test statutes, including acts of parliament, for compatibility with the constitution.[95] Note, however, that in some of these countries not all courts are permitted to do such a test, but only a specific court, often the constitutional court, is allowed to do so.

In the Netherlands, however, the Constitution prohibits acts of parliament being tested for compatibility with the Constitution or with ('unwritten') general principles of law. Acts of parliament may only be examined for compatibility with international treaties.[96] Since the constitutional prohibition of testing legislation only concerns acts of parliament, other legislation (for example, municipal legislation) could, however, be examined for compatibility with the Constitution as well as with general principles of law. In France the situation was very similar to the situation in the Netherlands. However, recently the French Constitution has been amended and it is noted by the French reporter that the impact of this reform is hard to predict. Further, in Canada and the UK courts do not test tax statutes for compatibility with the constitution or general legal principles.[97] This is based on the idea of sovereignty or, as the case may be, supremacy of parliament. In these countries, the issue of retroactivity is for courts only an issue of statutory interpretation: whether or not a statute has retroactive effect[98] – if it has retroactive effect, the courts apply the statute retroactively.[99]

The international treaties that are the most relevant for testing retroactivity are – at least in the European context – the EU Treaty and the European Convention on Human Rights.

As mentioned above, according to settled case law of the ECJ, the principles of legal certainty and legitimate expectations are considered general principles of EU law. Hence, in case the national tax legislation concerned falls under the scope of EU law, the retroactivity can be tested against the EU principles of legal certainty and legitimate expectations. Thus, if the national legislation concerns VAT, the retroactivity can be tested against these princi-

---

93. ECJ C-376/02, 26 April 2005, *Stichting Goed Wonen II*, para. 31.
94. E.g. the non-tax case ECtHR no. 6833/74, 13 June 1979, case *Marckx*, para. 58.
95. Austria, Belgium, Denmark, Finland, Germany, Greece, Hungary, Italy, Poland, Portugal, Spain, Sweden, Turkey, the USA.
96. It should be noted that at this moment there is a legislative proposal pending to change the Constitution on this issue. The proposal does not, however, provide for an overall withdrawal of the constitutional prohibition, but only in an amendment of it to allow – as an exception – the judge to test acts of parliament against certain constitutional provisions.
97. The Canadian reporter notes that some taxpayers have challenged retroactivity, advancing arguments based on the Charter of Rights and Freedoms, the Bills of Rights and unwritten unconstitutional principles, but that all these challenges have failed.
98. In this respect a 'rebuttable presumption of non-retroactivity' applies.
99. The same applies de facto in Finland and Denmark.

ples.[100] Moreover, as the case at hand should fall under the scope of EU law, not in all cases can retroactivity of national tax legislation be tested for compatibility with these EU principles.[101] Thus, the nature of the statute concerned, or at least of the case at hand, is important in this respect. As regards the standards to judge retroactive tax legislation, case law of the ECJ shows that retroactivity is in principle prohibited ("the principle of legal certainty precludes a measure from taking effect from a point in time before its publication"). However, this is not an absolute prohibition. If two requirements are met, the retroactivity may be permissible according to the ECJ. Retroactivity may be permissible "where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected."[102] Note that although retrospectivity is in principle allowed according to the ECJ, in that case as well legitimate expectations should be respected.[103]

With respect to the European Convention on Human Rights, in principle, Article 6 ECHR, Article 7 ECHR and Article 1 of the First Protocol ECHR are important for testing retroactivity. The principle of non-retroactivity of Article 7 ECHR, however, only concerns criminal offences. Furthermore, according to settled, but criticized, case law of the ECtHR, pure tax disputes do not fall under the scope of Article 6 ECHR.[104] Therefore, for retroactivity of tax legislation (not concerning tax penalties) only Article 1 of the First Protocol ECHR remains as a possibility to test retroactivity. Indeed, case law of the ECtHR shows that retroactivity of tax legislation can be tested against Article 1 of the First Protocol ECHR.[105] However, retroactive tax legislation is in principle not prohibited by Article 1 of the First Protocol ECHR.[106] The question to be answered is whether "the retrospective application of the law imposed an unreasonable burden (…) and thereby failed to strike a fair balance between the various interests involved." Whether or not this is the case, "depends, first, on the reasons for the retroactivity and, secondly, on the impact of the retroactive law on the position of the applicants."[107] Important is that the ECtHR has ruled that "a Contracting State, not least when framing and implementing policies in the area of taxation, enjoys a wide margin of appreciation" and that the legislator's assessment is accepted unless it "is devoid of reasonable foundation".[108] It should be noted that the ECtHR is stricter towards retroactivity with respect to one type of situation. This concerns the situation where the

---

100. E.g., ECJ C-381/97, 3 December 1998, *Belgocodex*, ECJ C-396/98, 8 June 2000, *Schloßstraße*, ECJ C-62/00, 11 July 2002, *Marks & Spencer*, and ECJ C-376/02, 26 April 2005, *Stichting Goed Wonen II*. See also for retrospectivity ECJ C-487/01 and C-7/02, 29 April 2004, *Gemeente Leusden/Holin Groep*. For retroactive charging by the tax administration see e.g. ECJ C-181/04 and 183/04, 14 September 2006, *Elmeka*.
101. The answer to the question when exactly an act can be tested for compatibility against a general principle of EU law does not seem to be very clear yet. See for one view S. Douma, 'The principle of legal certainty: enforcing international norms under community law', in: S. Douma and F. Engelen (eds.), *The Legal Status of the OECD Commentaries* (Amsterdam, IBFD, 2008,) at pp. 217-249.
102. EC, C-376/02, 26 April 2005, *Stichting Goed Wonen II*. See also e.g. ECJ C-381/97, 3 December 1998, *Belgocodex*, ECJ C-396/98, 8 June 2000, *Schloßstraße*, ECJ C-62/00, 11 July 2002, *Marks & Spencer*. For retroactive charging by the tax administration see e.g. ECJ C-181/04 and 183/04, 14 September 2006, *Elmeka*.
103. E.g, ECJ April 29, 2004, C-487/01 and C-7/02 (*Gemeente Leusden/Holin Groep*).
104. ECtHR no. 44759/98, 12 July 2001, *Ferrazzini*. This case law has been criticized in the literature; see for example Lee, Natalie, 'Time for Ferrazzini to be reviewed?', *British Tax Review* (2010), at pp. 589-609.
105. E.g. ECtHR 10 March 1981, no. 8531/79 (*A.B.C. and D.*), ECtHR 23 October 1997, nos. 21319/93, 21449/93 and 21675/93 (*National & Provincial Building Society c.s.*), ECtHR 10 June 2003, no. 27793/95 (M.A.), and ECtHR 23 July 2009, no. 30345/05 (*Joubert*). See about the ECtHR case law in this respect, e.g., Baker, Philip, 'Retroactive tax legislation and the European convention on human rights', *British Tax Review* (2005), pp. 1-9, and, in extenso, Pauwels, *supra* note 3, at pp. 401-440.
106. E.g. ECtHR no. 27793/95, 10 June 2003, (*M.A.*).
107. E.g. ECtHR no. 27793/95, 10 June 2003, (*M.A.*).
108. E.g. ECtHR nos. 21319/93, 21449/93 and 21675/93, 23 October 1997, *National & Provincial Building Society c.s.* and ECtHR no. 27793/95 10 June 2003, (*M.A.*).

retroactive law decisively influences a pending proceeding before court. The ECtHR considers that "the principle of the rule of law and the notion of fair trial (…) preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute." This rule also applies to retroactive tax laws.[109] Note that also here there is no absolute prohibition, as there may be "compelling grounds of the general interest" that justify the legislature's interference through the retroactive law.[110]

It can be assumed that, in principle, the possibilities that international treaties provide to courts for testing retroactivity are less important in the countries in which courts are constitutionally allowed to test retroactivity against the constitution, than in countries in which courts are not permitted to do so.

This assumption gets support in the various national reports, at least with respect to Article 1 of the First Protocol ECHR. On the one hand, in most of the countries in which courts are constitutionally allowed to test retroactivity against the constitution, Article 1 of the First Protocol ECHR does not play a role in case law (at least up till now).[111] On the other hand, in countries in which there are constitutional restrictions for the court to review acts of parliament, Article 1 of the First Protocol ECHR is regularly invoked by taxpayers for the courts to challenge retroactivity.[112]

In general, in countries in which courts test retroactivity of tax statutes for compatibility with Article 1 of the First Protocol ECHR, the various national courts have not, or very rarely, ruled retroactivity incompatible with that provision.[113]

Notwithstanding the above, it could (at least theoretically[114]) be that also in countries in which courts are constitutionally allowed to test retroactivity against the constitution, international treaties provide extra possibilities. This could be the case if the constitution does not impose restrictions on the retroactivity of tax legislation. This could also be the case if the restrictions that the constitution imposes (or at least the restrictions that courts derive from the constitution) are less strict than the restrictions that the international treaties impose.

1.5.3. **Standards applied when testing retroactivity**

The standards applied to test retroactivity of tax statutes in the different countries vary. An important reason is the variety of the restrictions that the constitutions impose with respect to retroactivity.

Furthermore, even if roughly the same standard were to be used in two countries, the way the courts use the standard may differ. This is caused by the fact that standards are usually abstract to a certain extent, which may have the effect that the application of the standard in a concrete case may differ. For example, the standard may be that retroactivity is only allowed in the case of special circumstances, or in case there are weighty reasons, but

---

109. E.g. ECtHR nos. 21319/93, 21449/93 and 21675/93, 23 October 1997, *National & Provincial Building Society c.s.* and ECtHR no. 30345/05, 23 July 2009, *Joubert.*
110. Which was the case in ECtHR nos. 21319/93, 21449/93 and 21675/93, 23 October 1997, *National & Provincial Building Society c.s.*
111. Austria, Hungary, Germany, Greece, Italy, Poland, Portugal, Spain, Turkey. This is obviously also the case in countries in which the national legislator does not introduce (disadvantageous) tax statutes with retroactive effect; for example Luxembourg.
112. France, the Netherlands.
113. Belgium, Denmark, Finland, France (exceptions are some administrative court decisions on a specific interpretative act, but the Supreme Administrative Court has not ruled yet), the Netherlands (exception is one case of a high court), Sweden, the UK.
114. In none of the various national reports an example was mentioned along this line.

there could be different results in a concrete case due to the fact that judgments may differ with respect to the question whether or not special circumstances exist, or whether the reasons the legislator had for the retroactivity are sufficiently 'weighty'.

Not in all countries are standards of the courts for testing retroactivity of tax statutes. This is obviously the case in countries in which the legislator does not introduce tax legislation with retroactive effect, notwithstanding the absence of a constitutional prohibition for the legislator in this respect.[115]

It could also be that standards are absent for another reason. One reason could be that there is a constitutional obstacle for courts to test retroactivity, which is – as seen above – the case in France and the Netherlands, at least with respect to acts of parliament. Another reason for the lack of standards could be that, although tax statutes may in principle be tested for constitutionality, case law shows that the chance that a court would declare retroactivity unconstitutional is merely theoretical.[116] In the same line, standards could be absent in countries in which the courts do not test the retroactivity of tax statutes, because granting retroactive effect to a tax statute is considered a political decision or because of the idea of the sovereignty/supremacy of parliament.[117]

However, the national reports show that in most of the countries standards are developed and used by the courts to test retroactivity, albeit sometimes standards are laid down directly in the constitution concerned.

In some countries the standards applied with respect to retroactivity are (partly) *formal* in the sense that the period of retroactivity is a decisive factor.

The most extreme standard in this respect is that – due to constitutional restrictions or due to restrictions derived by the courts from a general principle of law – retroactivity is never allowed in case it is disadvantageous for taxpayers.[118]

Another example is the standard that retroactivity is never allowed if and insofar as the period of retroactivity reaches beyond a certain period. This is the case in Greece for retroactivity that is unfavourable for taxpayers.[119] The Greek Constitution provides that such retroactive effect of a tax statute may not go beyond the fiscal year preceding the year of the publication of the statute (hence, a tax statute imposed in 2010 may not impose retroactively tax on income earned in the year 2008).[120]

The period of retroactivity could also be a decisive factor the other way around, namely that retroactivity is in any case allowed as long as retroactivity stays within a certain period. This is the case in Greece: retroactivity of tax statutes to the fiscal year preceding the year of publication of the statute is in any case allowed. In a certain sense this is also the case in countries that have a 'tax period-related concept' of retroactivity (supra, section 1.1). Since in these countries a statute that is introduced during a fiscal year (e.g. in November 2009) and that applies as from the beginning of that year (e.g. 1 January 2009) is not considered retroactive, backdating is thus in any case allowed to the extent that it stays within the fiscal year.

---

115. Luxembourg.
116. Denmark, Finland. In Finland the courts see themselves to be bound in their judicial review to the guidelines of the Constitutional Committee. If the Constitutional Committee has not challenged retroactivity, the courts dare to do that independently.
117. Canada, the UK.
118. Hungary, Poland, Portugal.
119. For favourable retroactivity no time limit applies.
120. An exception applied in a situation in which the ECJ found a tax exemption provided by the Greek tax law to be prohibited state aid. The tax that was levied retroactively beyond the time limit allowed by the Greek Constitution. The Greek Council of State did not consider this to be a violation of the Greek Constitution.

In most countries, however, courts employ, whether together with a formal standard in the above-mentioned sense or not, *substantive* standards. The following can be derived from the national reports:[121]

- In Austria the Consitutional Court considers retroactivity incompatible with the principle of equality, viz. its sub-principle legal certainty, if it infringes legitimate expectations. To assess whether there is such an infringement, the Court first looks at the clarity of the legal statute that was changed retroactively. If it was clear that that legal statute provided for a lower tax burden, then the significance of the tax burden and the gravity of the grounds of justification for the retroactivity are taken into account in order to assess whether the principle of legitimate expectations is infringed. These criteria have to be balanced case by case.
- In Belgium the Constitutional Court does not consider every retroactive statute to constitute an infringement of the principle of legal certainty. First of all, it is possible that retroactive provisions simply confirm legal rules that had been published earlier. Secondly, retroactivity can be justified in certain circumstances. Whether grounds for justification are present is examined on a casuistic basis. Justification is possible when the retroactive effect of a legal rule is indispensable to achieve a goal of public interest, such as the well-functioning or continuation of public services. The interest of public revenue is only accepted as a justification when it is accompanied by other persuasive considerations. Furthermore, in the situation in which the retroactive effect of an act substantially influences the outcome of pending cases, a strict approach applies: either "exceptional circumstances" or "compelling motives of public interest" are required. Notwithstanding these strict requirements, case law shows that it is possible that there are situations in which courts accept that such exceptional circumstances are present.
- In Finland the Supreme Court would rule that retroactivity is unconstitutional in case the legislator does not meet the test formulated by the Constitutional Law Committee.
- In Germany the Constitutional Court holds in principle that there is a ban of retroactivity, but allows exceptions.[122] A first exception is the situation in which a reasonable taxpayer cannot claim trust in the (still) prevailing legal situation, which is the case (i) from the date of adoption of the bill in parliament, or (ii) in the case of an evidentially unclear or unconstitutional legal situation.[123] A second exception is the situation in which the confidence in the prevailing legal situation has to be subordinated to the interest of the legislator to change the law retroactively. This applies if (i) the disadvantage the taxpayer suffers from the retroactive enactment is negligible (de minimis rule; it can be seen as an outcome of the principle of proportionality), and (ii) the legislator can claim overriding urgent/compelling public interest. Mere public revenue interest has never been accepted as the only ground of justification, but it could be combined with facts which shake the taxpayer's faith, for example the legislative intent to combat announcement effects.
- In Italy the Constitutional Court tests retroactivity against the constitution and the enshrined general principles; the constitutional 'ability-to-pay principle' is invoked, but more recently also the principle of legitimate expectations is used. On the basis of this latter principle, retroactivity of tax statutes must be justified by 'reasonablness' and may

121. Please take into consideration that that the question whether or not a justification exists for *retroactivity* is preceded by the question whether or not there is retroactivity. As the latter question may be answered differently (for example, depending on whether a 'tax period-related concept' or a 'taxable event-related concept' of retroactivity is used; see section 1.2.5) it could be that, for the same situation, the court in the one country has to answer the former question but that the court in another country does not get around to that question.

122. For the approach of the German Constitutional Court with respect to retrospectivity, see the German national report. Here we note that, interestingly, the court has recently imposed more strict limitations to retrospectivity.

123. This latter exception was invented to overcome the transition period after the Second World War, but has hardly ever been used.

not be in conflict with 'values and constitutional interests'. In general, the protection of a higher collective interest could be accepted as a justification: for example, the curbing of tax evasion and the abuse of tax laws, or the existence of an extraordinary economic situation. Sometimes also 'Treasury requirements' based on extraordinary fiscal needs are accepted.

- In the Netherlands, the Supreme Court takes the position that deviation from "the legal principle based on the requirements of legal certainty that legislative measures should only apply for the future" to the disadvantage of taxpayers is only justified in the case of 'special circumstances.'[124] It is not entirely crystallized out which circumstances could qualify as such a special circumstance. Though it is clear that in case the taxation for which the retroactive rule provides was foreseeable for taxpayers, the retroactivity concerned could be justified. Up till now, the Supreme Court has never ruled in a concrete case that the retroactivity at stake was incompatible with the principle of legal certainty. The Supreme Court did, however, once rule in a case of retrospectivity (immediate effect without grandfathering) that the principle of legal certainty had been infringed.
- In Spain retroactivity of tax statutes is forbidden unless 'it is justified by serious reasons of general interest.' Constitutional case law provides examples of cases in which retroactivity is considered not unconstitutional as well cases in which retroactivity is deemed to be unconstitutional.
- In Sweden, based on a constitutional provision, retroactivity of tax statutes is in principle prohibited, unless one of the exceptions applies that is described in detail in that constitutional provision. One of these exceptions applies when the government or a parliamentary committee has presented a tax bill to parliament. In such a case, tax can be levied already as of the day that the bill was presented to parliament. The same applies when the government transmits to parliament a written communication stating that a tax bill will be forthcoming. This possibility has frequently been used, especially in order to hinder undesired consequences of tax law, such as undesired tax planning and tax evasion. According to the constitutional provision, the parliament may furthermore prescribe that exceptions shall be made on the principle of non-retroactivity if it considers this is warranted on special grounds connected with war, the danger of war or grave economic crisis. It is noted that only once did a court deem a retroactive tax statute unconstitutional.
- In Turkey the Constitutional court takes the following position: 'Under the principle of non-retroactivity, the statutes must be applied on subsequent legal actions, events or transactions that are occurred after their enactment. Exceptional cases may appear which are accepted as necessary for public interest or public order or for the protection of vested rights or for the improvement of financial rights.' Although the Constitutional Court has tested retroactive tax statutes in a few cases, no retroactive tax statute has found to be incompatible with the Constitution.
- In the US, there are technically two strains of federal constitutional doctrine that can be invoked to limit the enactment of retroactive taxes,[125] but in modern practice these two are generally viewed as one. In the important case United States v. Carlton (1994) it was noted by the majority opinion of the Supreme Court: 'Provided that the retroactive appli-

124. Note that this case law concerns rules not being acts of parliament. As mentioned above, the Netherlands courts are not allowed to test acts of parliament against the Constitution or 'unwritten' general principles of law, but only against norms included in treaties.

125. The first involves potential limits on the power of the federal Congress, primarily under the Fifth Amendment's command that property not be taken by Congress without due process of law, but also under the 'contract clause.' The second involves the potential limits under the fourteenth amendment on the state legislatures' ability to impose taxes.

cation of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.' Furthermore, the majority opinion effectively dismissed the only set of cases (dating from the years 1927 en 1928) in which the Supreme Court held that, in these cases, retroactive taxes imposed by Congress were invalid. Thus, nowadays, the Supreme Court does not impose strict limitations on the use of retroactivity.[126] In a certain type of situation the Supreme Court is, however, more stringent. The Supreme Court is very hostile to attempts by state legislators to limit the effect of judgments holding state taxes invalid. It is expected – based on the separation of powers doctrine – that the same would apply in case the Congress were to try to cure defective (federal) tax collections.

This overview shows that the *substantive* standards to test retroactivity vary. However, there are some general lines. The general substantive standard is generally that there should be a justification for retroactivity that is disadvantageous for taxpayers. There are basically two lines of justification, although not in all above-mentioned countries the two lines are both employed. First, the line that concerns the expectations of taxpayers: retroactivity could be allowed in case retroactivity is considered not to infringe taxpayers' reasonable expectations. Secondly, the line of a compelling public interest: retroactivity could be allowed in case an overriding public interest is served by the retroactivity. Note that the first line implies that the weight of legal certainty is considered low, while the in the second line the public interest outweighs the principle of legal certainty. Both lines show that the issue of retroactivity is a 'balancing act'. Noteworthy is also that, at least in some of the countries, the mere public revenue interest is not accepted as the only justification for retroactivity.

1.5.4. **Final observations**

In general, it can be observed that in the various countries the standards that courts impose for retroactivity of tax legislation differ significantly. On the one side, there are countries in which the courts (almost) fully leave the issue of granting retroactive effect to tax legislation to the discretion of the legislator (or parliament, as the case may be). On the other side, there is a group of countries in which an (almost) absolute prohibition of retroactive taxes applies. Between these opposite positions, there are countries in which courts review whether legislator's decision to grant retroactive effect stays within certain (formal and/or substantive) standards. These differences are at first sight remarkable.

More research should be done on this issue, but it seems that the differences partly have historical roots. Countries in which the restrictions for retroactivity are the most stringent have often recently overcome a non-democratic past.[127] Further, countries in which courts in principle (almost) fully respect the legislator's decision to grant retroactive effect to tax statutes often have a strong democratic history.

126. Please note that the *state* courts (at least some of them) impose more stringent limitations on retroactivity than the Supreme Court. There are also recent examples of cases in which a state court found retroactivity invalid; see the US report.

127. Compare the Hungarian national report for an observation along this line for Hungary.

1.6. Views in the literature

1.6.1. Opinions regarding retroactivity

The literature regarding the prohibition on retroactive legislation corresponds, to a large extent, to the national constitutional and legal provisions and the national case law on retroactivity. In Greece, for example, the prevailing opinion is that there is a duty to protect the constitutional temporal restrictions. In the USA, academic writers find few constitutional problems with retroactive tax legislation. The Turkish literature strongly opposes the case law of the Turkish Constitutional Court.

In one country there is hardly any debate in the literature (Hungary). In many countries, the literature largely focuses on conceptual distinctions and the legal consequences connected to the different concepts, the (weight of the) principle of non-retroactivity, and grounds of justifications (e.g. Germany, the Netherlands). Tax law scholars and sometimes constitutional law scholars may contribute to the debate (e.g. Sweden). In Austria the tax literature does not deal with the problem of retroactivity in a way that goes beyond the case law of the Constitutional Court.

Scholars generally take a critical stance towards retroactivity, their concern being among other things proportionate protection of legal certainty and predictability (e.g. Spain). In Canada practitioners tend to criticize all forms of retroactive tax laws, while academic lawyers approach the problem more thoughtfully. Possible justifications of the use retroactivity are often debated, e.g. targeting abuse or avoidance or the prevention of announcement effects or 'windfall gains', and sometimes closing gaps in tax law. However, even when scholars accept that retroactive effect may sometimes be granted, this does not imply a *communis opinio* with respect to the question when retroactivity of tax legislation is justified (e.g. the Netherlands). Policy changes in favour of the taxpayer are often debated, also in countries with a prohibition of non-retroactivity (Poland, Portugal). In the USA, the desirability of general policies when tax changes are made is still a matter of considerable debate, especially to prevent infringements of the principle of equality.

Therefore, it seems that the appreciation of retroactivity partly depends on the legal culture of a country.

1.6.2. Debate on law and economics view on transitional law

The law and economics view has hardly provoked any debate in the tax literature, as far as the reviewed European countries and Canada are concerned. In these countries, though, in other fields of law the law and economics movement is often flourishing. The one country where law and economics is an important view in the scholarly tax literature is the USA.

Part 2
Special Topics

2.1.
Legal certainty: a matter of principle

Hans Gribnau

2.1.1. Introduction

People value legal certainty. Predictability of law protects those subject to the law from arbitrary state interference with their lives. Legal certainty enables people to plan their future. Retroactive rule-making compromises the ideal of legal certainty. Therefore, legislators considering the possibility of introducing retroactive legislation should proceed carefully. This is easier said than done.

The use of retroactive rules to redress or repair situations or decisions deemed unfavourable is not a recent invention. Moreover, even the world's greatest minds are sometimes tempted to make use of retroactivity. The public interest is often invoked to justify retroactive legislation. As did Alexander Hamilton (1755-1804), American statesman and co-author of one of the most famous political treatises, the Federalist Papers. Hamilton lived in a time of great societal upheaval. After losing the city elections of New York for the state legislature, he and fellow Federalists appealed to Governor John Jay (co-author of the Federalist Papers) to convene the outgoing state legislature to impose new rules for choosing presidential electors. 'Most shocking of all, they wanted this new system applied retroactively, to overturn the election.'[1] Hamilton argued that 'in times like these in which we live, it will not do to be overscrupulous. It is easy to sacrifice the substantial interests of society by a strict adherence to ordinary rules.'[2]

Here, we breathe in the typical odour of retroactivity: to cheat, to play a trick on the rule of law, to recede from a decision, which may lead to frustrated prospects and plans, financial losses, diminished trust in government, etc. No wonder retroactivity of legislation is a controversial issue. This also goes for retroactive tax legislation. Decreasing legal certainty may chip away at the tax legislator's legitimacy, and may produce decreasing taxpayer compliance.

---

1. R. Chernow, *Alexander Hamilton* (New York: The Penguin Press, 2004), at p. 609.
2. Chernow, *supra* note 1, at p. 609. Chernow adds: 'This from a man who had consecrated his life to the law.'

Consequently, retroactivity of tax legislation is a controversial issue which is related to many legal and even political themes. On the one hand, legislation is the primary legal source of taxpayers' rights and obligations; on the other hand, legislation is the product of a political process. Legislation provides the legal basis for the levy of taxes. Legislation and the imposition of taxes are both an exercise of (political) power with an inherent risk of abuse of power. Distribution of power according to the principle of separation of powers is an important instrument to protect taxpayers against arbitrary interferences and abuse of power. Checks and balances are a complement to this distribution of power among the branches or powers of government – legislative, executive, and judicial. However, checks and balances will never be able to completely control the use of power. This also goes for the power of the legislator, particularly the power to enact tax legislation with retroactive effect. The legislator, therefore, should restrain himself; he should exercise self-discipline.

Tax legislation with retroactive effect is but a part of a wider phenomenon, viz. the change of the body of (tax) laws. Therefore, the main problem to be addressed will be: which norms guide the legislator willing to change the body of tax laws in the exercise of self-discipline? Which norms enable an assessment of the use of retroactive tax legislation from the perspective of legal certainty?

In getting a grip on this research problem the following ideas will figure as a leitmotiv. Laws have to keep up with all kinds of societal and economic changes. Therefore, change is a characteristic of the body of legal rules. However, a measure of stability is indispensable in order to offer people guidance. This area of tension explains the need for norms which enable us to assess the legitimacy of changes in tax legislation, including the use of retroactive tax legislation. These norms regard the legislator's use of rules, i.e., the introduction, amendment and abolishment of legal rules. These norms aim at achieving certainty of law. This certainty of law, legal certainty, has to be distinguished from certainty through law, i.e., the more abstract ideal of the legal system as a whole providing security for the liberty of human beings.

Rules play an important role in the human need for certainty. Rules offer structure, regularity, stability, reliability and predictability. Law as a body of rules aims at sharing these virtues. Legal rules enhance certainty of law. Rules are the stuff legislation is made of. Legislative rules attaching legal consequences to taxpayers' actions guide taxpayers' behaviour. Thus, taxpayers can calculate their tax liability and predict the tax administration's behaviour. Legal rules enable taxpayers to cope with uncertainties involved in the levying of taxes. However, these legal rules themselves are subject to change. Change has impact on the degree of guidance rules offer.

This raises important questions: is the rule of law to be reduced to the rule of rules? Does a legal system consist of rules which can be changed at will, for example with retroactive effect? Do rules exhaust the rule of law, or are other general legal norms part of the legal system? That is to say, are there other legal norms which enable us to assess the (retroactive) change of rules? As will be shown, this question touches upon the difference between formal and substantive conceptions of the rule of law. It will be argued that the law is not morally neutral as to the end to which it as an instrument is put. Therefore, the rule of law as a means should not be disconnected from the external end(s) its serves.

Legal principles, embodying the internal morality of law, enable us to assess changes in tax legislation, legislative changes included. Legal rules are meant to offer certainty, and they can fulfil this function in different ways, as expressed by the different aspects of the principle of legal certainty. Each of these different aspects of the principle of legal certainty has its own demands which have to be balanced. They enable us to pinpoint the virtues and vices of legislative changes with regard to legal certainty, the certainty legislative rules aim to provide.

To address the research problem a number of research issues will be dealt with. These questions may be of a normative, descriptive, explanatory or evaluative nature. The research problem, therefore, is a mix of different kinds of research questions. The explanation and

evaluation call for the development of a theoretical framework necessary for any reflection on a legislative practice, viz., the use of retroactive tax legislation. This practice is partly political and partly legal in nature. Therefore, to answer the research issues, I will make use of legal and political theory. An interdisciplinary approach to legal certainty will thus be adopted.[3]

Here, I will not develop a comprehensive theoretical framework for the assessment of the use of retroactive tax legislation.[4] However, I will give some theoretical reflections on the principle of legal certainty and its place in the legal system, necessary for the assessment of the use of retroactive tax legislation. I will start with the importance of rules for human beings. Law will be elaborated upon, being a system of rules which enhances important values such as stability, regularity and reciprocity. Then, I will set out a conception of the rule of law. This conception in its turn is based on a conception of law itself, in which values and principles constitute the fundamental norms of the legal system. Then, I will deal with the notion of legal certainty, subsequently distinguishing different aspects of legal certainty.

2.1.2. **The rule of law**

The rule of law is an essentially contested concept which inevitably involves endless disputes about its proper use.[5] Nonetheless, there seems to be a general consensus as to the core of the ideal of the rule of law. Bingham suggests that the core of the principle of the rule of law 'that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.'[6] The exercise of power by rulers, such as the levying of taxes, should be restrained by law.[7] The rule of law – government by law – should have primacy over the rule of men.

The concept of the rule of law has two different – but closely connected – meanings. The first meaning is government *sub lege*, i.e., government govern in accordance with the established laws. This also holds for legislators: they should exercise their power in accordance with the existing basic norms of the legal system (pre-established legal principles included). The rule of law can also refer to government *per leges*. This means that government must function through laws, i.e., through general and abstract norms rather than specific and concrete decrees.[8] According to the widespread ideal of the rule of law, government should exercise power via general legislation. This requirement of general legislation serves as an important protection against arbitrary interferences with individual rights and liberties by the public authorities.

---

3. Here the term 'interdisciplinary approach' – going beyond a multidisciplinary treatment of the tax subject – is used, meaning 'that the tax researcher adopts the perspectives and research approaches of more than one academic discipline', M. Lamb et al. (eds.), *Taxation: An Interdisciplinary Approach to Research* (Oxford/New York: Oxford University Press, 2005), at p. 7.
4. For a comprehensive theory of retroactive tax legislation, see M.R.T. Pauwels, *Terugwerkende kracht van belastingwetgeving: gewikt en gewogen* (Amersfoort: Sdu Uitgevers, 2009), at pp. 1-322. See also M. Schuver-Bravenboer, *Fiscaal Overgangsbeleid* (Deventer: Kluwer, 2009).
5. W. Gallie, 'Essentially Contested Concepts', in: W. Gallie, *Philosophy and the Historical Understanding* (Chatto & Windus, London, 1964), at p. 157. He convincingly argues that this essential contestability is proof of the continuing need of 'vital, agnostic philosophy' (156).
6. T. Bingham, 'The Rule of Law', *Cambridge Law Journal*, 66(1), 2007, pp. 67–85, at p. 69.
7. H. Gribnau, 'General Introduction', in: G.T.K. Meussen, ed., *The Principle of Equality in European Taxation* (The Hague, London, Boston: Kluwer Law International, 1999), pp. 1-33, at pp. 6-8.
8. N. Bobbio, 'The Rule of Men or the Rule of Law', in: N. Bobbio, *The Future of Democracy* (Minneapolis: University of Minnesota Press, 1987), at pp. 143-144. For an overview of the history of this idea, see G. Kirchhof, *Die Allgemeinheit des Gesetzes* (Tübingen: J.C.B. Mohr (Paul Siebeck), 2000), at pp. 39-173.

This general law is opposed to any kind of individual command (*rule of men*). It is an abstract rule which does not mention particular cases or individually nominated persons, but is issued to apply to all cases and persons in the abstract.[9] Law conceived as a general and abstract norm is attributed the intrinsic virtue of promoting certainty, equality, and liberty.[10] With regard to legal certainty, the capacity of law to provide certainty depends its abstractness, which is a purely formal characteristic of law.[11] This ideal of rule-governance developed into a central pillar of liberal and constitutional government during the nineteenth century.[12]

Thus, there are strong ties between rules, legal certainty, and the rule of law. On the one hand, the rule of law refers to a legal system based on general and abstract rules. On the one hand, legal certainty is one of the central tenets of the rule of law. For example, the Rule of Law Index, published by the World Justice Project, gives legal certainty a prominent place among the four universal principles from international sources. As used by the World Justice Project, the rule of law refers to a rules-based system in which four universal principles are upheld, one of these being: 'The laws are clear, publicized, stable, and fair, and protect fundamental rights, including the security of persons and property.'[13] As stated above, there are many conceptions of the rule of law, but the principle of legal certainty is generally recognized to be a key ingredient of it.[14] I will now elaborate on the links between rules, legal certainty, and the rule of law.

2.1.3. Formal conceptions of the rule of law

2.1.3.1. The rule of rules

Friedrich Hayek's influential definition of the rule of law is clear on the relationship between rules, legal certainty and the rule of law: 'stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced before-hand, rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.'[15] A law may be bad or unjust, therefore, but the demand that law must be just falls outside the scope of a formal conception of the rule of law, its only (formal) criteria of

---

9. F.L. Neumann, *The Rule of Law. Political Theory and the Legal System in Modern Society* (Leamington Spa: Berg Publishers, 1986), at pp. 212-213; according to Neumann, this formal structure of law contains at the same time 'a material element, namely the prohibition of retroaction.'
10. For the connection between liberty and certainty in the sense of guaranteeing liberty ('freiheitrechtlicher Schutz' / 'freiheitssicherende Kraft des allgemeinen Steuergesetz'), see Kirchhof, *supra* note 8, at pp. 535 ff and G. Kirchhof, 'Netto-Prinzip umd gemischte Aufwendungen: Zu den drei Ebenen der Verfassungsdeutung', in: *Gestaltung der Steuerrechtsordnung: Festschrift für Joachim Lang* (Cologne: Verlag Dr. Otto Schmidt, 2010), pp. 563-588, at p. 587.
11. By contrast, the capacity of law to promote equality stems from another formal characteristic of law, viz. the nature of the general norm as one which applies not just to an individual but to a class of individuals and which can even be formed by all the members of a social group; Bobbio, *supra* note 62, at pp. 143-144.
12. F. Dallmayer, 'Hermeneutics and the Rule of Law', in: G. Leyh. ed., *Legal Hermeneutics. History, Theory and Practice* (Berkeley: University of California Press, 1992), at p. 9. He argues that 'rule-governance or the rule of law underwent a subtle change: namely in the direction of a steady formalization and legalization.'
13. The World Justice Project, *Rule of law Index 2010*, www.worldjusticeproject.org, at p. 2. The other three universal principles are: The government and its officials and agents are accountable under the law; The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient; Access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.
14. See, for instance, Bingham, *supra* note 6, at p. 69 who identifies as the first sub-rule of the principle of the rule of law, that 'the law must be accessible and so far as possible intelligible, clear and predictable.'
15. F. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1996), at p. 80.

justice being generality and equality. These criteria must be observed if the rule of law is to be effective, for effectiveness is what a formal conception of the rule of law is about.[16] The rule of law in this sense enhances individual freedom by allowing people to choose between options. This is the notion of 'legal liberty': freedom to do what the law permits. Individual liberty is promoted by rules which enable individuals to know the range of activities which are not prohibited by the law. In this range they are completely free to choose between options as they please without being exposed to government coercion.[17] Thus, in a free society 'the private individual cannot be ordered about but is expected to obey only the rules which are equally applicable to all.'[18]

Thus, the rule of law boils down to the rule of rules, for Hayek wants people to be free from state interference that is not specified in a rule. This formal conception of the rule of law has its drawbacks. Gray criticizes Hayek's underlying conception of liberty, especially the claim that it is subjection to arbitrary will that constitutes unfreedom. If, as Hayek argues, we have to obey general and abstract rules irrespective of their application to us, 'it is the case that many different sets of rules will be left in the field', according to Gray. For Hayek, promotion of the common good is the (utilitarian) criterion for just rules. However Hayek's theory lacks any serious side-constraint principles on maximizing aggregate social utility. The central defect of his theory, therefore, is the lack of any substantive conception of individual rights offering protected areas of action. Gray concludes that Hayek blurs the boundaries of individual freedom and assimilates it to other goods such as the rule of law and social stability.[19] Substantive conceptions of the rule of law remedy this defect; here individual rights guarantee liberty. I will come back to the substantive conceptions of the rule of law in the next section.

Both formal and substantive conceptions of the rule of law view rules as a means to enhance certainty. Hayek, defending a formal conception of the rule of law, elaborates on this issue. According to Hayek, the rule of law requires that the laws must be general, abstract rules. Moreover, these rules must be known and certain, and should apply equally.[20] These important characteristics of rules distinguish the rule of law from the rule of men, as mentioned above. Legal rules, therefore, are construed at a high level of generality and impersonality. With regard to the first attribute of 'true laws', he points out that general and abstract rules are laid down in advance irrespective of their application. These general, abstract rules are 'essentially long-term measures, referring to yet unknown cases and containing no references to particular persons, places or objects.'[21] In order to satisfy the demand of equality, the third requirement, a law must be general 'in referring only to formal characteristics of the persons involved.'[22]

As for the second chief attribute, legal certainty, my main concern here, Hayek offers us two observations.[23] On the one hand, the importance of legal certainty for 'the smooth and efficient running of a free society can hardly be exaggerated.' Nonetheless, Hayek maintains that 'complete certainty of the law is an ideal which we must try to approach but

16. F.A. Hayek, *The Constitution of Liberty* (Chicago: The University of Chicago Press, 1960), at pp. 208-210.
17. B.Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), at p. 66.
18. Hayek, *supra* note 16, at p. 208.
19. J. Gray, 'Hayek on Liberty, Rights and Justice', in: J. Gray, *Liberalisms: Essays in Political Philosophy* (London/New York: Routledge, 1989), at pp. 89-102; cf. Tamanaha, *supra* note 16, at pp. 70-71.
20. Hayek, *supra* note 16, at pp. 208-210.
21. Hayek, *supra* note 16, at p. 208. Cf. at pp. 151-154.
22. Hayek, *supra* note 16, at p. 209.
23. For an overview of some moments in the history of this idea, see A. von Arnauld, *Rechtssicherheit. Perspektivische Annäherungen an eine* idée directrice *des Rechts* (Tübingen: Mohr Siebeck, 2006), at pp. 9ff. Cf. J.R. Maxeiner, "Some Realism About legal certainty in the Globalization of the Rule of Law', in: M. Sellers & T. Tomaszewski, eds., *The Rule of Law in Comparative Perspective* (Dordrecht: Springer, 2010), at pp. 41-55.

which we can never perfectly attain.'[24] On the other hand, the extent to which this relative certainty has in fact been achieved should not be belittled.[25]

2.1.3.2. **Law is a knife**

Legal certainty is also a central tenet of a more recent view on the rule of law put forward by the legal philosopher Raz, who also asserts a formal conception of the rule of law. He observes that government's subjection to the rule of law drastically restricts the possibility of arbitrary use of its power. Nonetheless, many forms of arbitrary rule are compatible with the rule of law. 'A ruler can promote general rules based on whim or self-interest, etc. without offending against the rule of law.'[26] Moreover, the rule of law furthers individual liberty and human dignity. It enables people to plan their activities with foreknowledge of their potential legal implications. Respecting human dignity entails respecting people's autonomy, i.e. 'treating humans as capable of planning and plotting their future autonomy.'[27] Thus, people are enabled to be author of their own lives. Autonomy is the ability or capacity to govern oneself. 'Autonomy' carries a connotation of consciousness, of 'the capacity to make choices upon reflection.'[28] This personal autonomy alludes to the condition of a man whose choices and actions are an expression of his own preferences and aspirations.[29]

Raz followed in the footsteps of Hayek when he identified 'the basic intuition' underlying the rule of law: 'the law must be capable of guiding behaviour of its subjects.'[30] The law must be such that people can acquire knowledge of the law. If not, the law is not capable of being obeyed, for its subjects cannot find out what it is they cannot act on it. Conformity to the rule of the law is a necessary condition for the law to be serving directly any good purpose. Raz compares law to a knife. 'A good knife is, among other things, a sharp knife. Similarly, conformity to the rule of law is an inherent value of law, indeed it is their most important inherent value.' Conformity to the rule of the law is 'the virtue of law in itself, law as law regardless of the purposes it serves. […] Like other instruments, the law has a specific virtue which is morally neutral in being neutral as to the end to which the instrument is put.'[31]

---

24. Hayek, *supra* note 16, at p. 208.
25. Hayek offers a kind of measurement for the degree of certainty of the law: 'the disputes which do not lead to litigation because the outcome is practically certain as soon as the legal position is examined'; Hayek, *supra* note 16, at p. 208.
26. J. Raz, 'The Rule of Law and its Virtue' [1977], in: J. Raz, *The Authority of Law* (Oxford: Oxford University Press, 2009), at pp. 210-229. Moreover, the belief that the rule of law is particularly relevant to the protection of (substantive) equality and that equality is related to the generality of law is mistaken. 'Racial, religious and all manner of discrimination is not only compatible but often institutionalized by general rules' (at p. 216).
27. Raz, *supra* note 26, at p. 221.
28. R. Dagger, 'Politics and the Pursuit of Autonomy', in: J.R. Pennock & J.W. Chapman, eds., *Justification*, [Nomos XXVIII] (New York/London: New York University Press, 1986), pp. 270-290. This connotation of consciousness is absent in ordinary uses of 'liberty' and 'freedom.'
29. H. Spector, *Autonomy and Rights: The Moral Foundations of Liberalism* [1992], Oxford: Oxford University Press, 2007), at pp. 90-91, referring to Rousseau's dictum that an autonomous man is obedient to a law he prescribes to himself. For the (Kantian) idea of autonomy, echoing Rousseau, as self-legislation, see J.B. Schneewind, *The Invention of Autonomy*, (Cambridge: Cambridge University Press, 1998), at pp. 483ff. See J. Rawls, 'The Idea of Public Reason Revisited', in: J. Rawls, *Collected Papers*, ed. S. Freeman, (Cambridge/London, Harvard University Press, 1999), at p. 586 on political and moral autonomy.
30. J. Raz, *supra* note 26, at p. 214. To be sure, Raz also criticizes Hayek's position which 'inevitably leads to exaggerated expectations' (at p. 226).
31. Raz, *supra* note 26, at pp. 225-26. This way of conceiving goodness or virtue of anything or excellence (*aretē*) dates back to Aristotle, see Aristotle, *The Nicomachean Ethics*, ed. D. Ross (Oxford/New York: Oxford University Press, 1984), 1097b24-1098a18. He answers the question about the nature of a thing by 'formally looking to function or characteristic activity or essence (*ergon*)'; J. Roberts, *Aristotle and* the Politics (London/New York: Routledge, 2009), at pp. 11-12.

Raz, therefore, disconnects the rule of law as means and the external end(s) it serves. It is a purely instrumental, morally empty understanding of the rule of law. This version of the rule of law has no content requirement, which 'renders it open to a range of ends.'[32]

According to Raz, many principles can be derived from the basic idea of the rule of law; they depend for their validity or importance on the particular circumstances of different societies. Raz sees little point in trying to enumerate all these principles. He only mentions some of the more important ones. Significantly, he starts with two principles which are connected to the ideal of legal certainty. First, Raz mentions the principle that all laws should be prospective, open and clear. Here, he immediately points out that retroactive law cannot guide people's behaviour.[33] However, retroactive law in itself is not a line that must never be crossed, for when it is known for certain at the time of action that a retroactive law will be enacted, there is 'no conflict with the rule of law (though it may be objected to on other grounds).'[34] Moreover, the law must be open and adequately publicized. If the law is not knowable people cannot find out what the law is, and it will not guide their conduct. In order to guide, the law's meaning must be clear, i.e., the law should not be ambiguous, vague, obscure or imprecise. The second principle connected to the ideal of legal certainty is that laws should be relatively stable. Frequently changing laws hamper people in finding out what the law is at any given moment and they won't be sure the law has not been changed since the last time they learnt what it was. Raz points out that stability regards short-term decisions as well as long-term planning. 'Knowledge of at least the general outlines and sometimes even of details of tax law and company law are often important for business plans which will bear fruit only years later.'[35]

2.1.4. Substantive conceptions of the rule of law

2.1.4.1. Law as command versus tacit reciprocity

Substantive conceptions of the rule of law oppose the idea that law is a neutral instrument; they oppose the idea that anything goes. Defendants of a substantive conception of the rule of law argue that fundamental legal norms, viz., general legal principles, set boundaries to lawmaking. The legislature and other lawmaking institutions are bound by these fundamental legal norms. These general legal principles limit the lawmaker's freedom. Law is connected to the fundamental norms and values prevalent in a society of free and equal citizens by means of general legal principles. Principles can be considered to be expressions of legal values which constitute the normative foundation of law in a modern democratic state. Law in its turn seeks to implement legal values, such as equality, efficiency and certainty, which can be regarded as reflections of social and cultural norms and values.[36]

Formal conceptions of the rule of law boil down to a command theory of law: law is seen as the command of the sovereign lawmaking power. This command theory implies a denial of the relevance of general legal principles. These principles are not viewed as basic norms of the legal system which are binding upon the lawmaking institutions. However, if

---

32. Tamanaha, *supra* note 16, at p. 94. As Hayek already pointed out, this formal legality is in essence a matter of rules.
33. Cf. K. Tipke, *Die Steuerrechtsordnung: Vol. I* (Cologne: Verlag Dr. Otto Schmidt, 2000), at pp. 145 ff, who characterizes the principle of non-retroactivity as a formal principle of the state under rule of law.
34. Raz, *supra* note 26, at p. 214.
35. Raz, *supra* note 26, at p. 215.
36. For a comprehensive legal philosophy with legal values at its core, see G. Radbruch, 'Legal Philosophy', in: *The Legal Philosophies of Lask, Radbruch and Dabin* (Cambridge, Mass.: Harvard University Press, 1950), at pp. 107-111. For Radbruch's conception of values as standards of evaluation, see S. Taekema, *The Concept of Ideals in Legal Theory* (The Hague, London, New York: Kluwer Law International, 2003), at pp. 69-93 and Gribnau, *supra* note 7, at pp. 20-21. For a substantive conception of the rule of law, see Bingham, *supra* note 6.

the relation between the state and the individual is seen as 'nothing more than that of a superior to inferior, the sovereign will as expressed in legislation, may be arbitrary, despotic and irrational.'[37] In this Hobbesian view legislation is regarded as the command of the sovereign, i.e. the legislator.[38] To be sure, Hobbes does recognize some limits to legislation – notably the demand of promulgation and non-contradiction. Still, in my view a command theory of law is inadequate. Law is not to be reduced to a command of the sovereign (legislature). Montesquieu, therefore, defined laws as follows: 'Laws, in their most general signification, are the necessary relations arising from the nature of things.'[39] Montesquieu spoke of law as a relation precisely because 'he did not regard it as the command of a superior or the will of a sovereign.'[40] In short, legal rules lead to the desired behaviour if they 'concur with the values of the people whose behaviour they try to guide and influence.'[41]

In the same vein, the legal scholar Kahn observes that law's rule includes a family of related ideas. Law cannot be reduced to commands which have to be obeyed independent of their content. Legal rules, important though they are, do not make up the whole picture. There is more to law, for those ideas underlying the rule of law include 'expectations about regulations, procedures, and institutions, conceptions of authority, justice and legitimacy.'[42] This stress on expectations fits well in with the argument of the legal philosopher Fuller that the lawgiver should take citizens more seriously than proponents of command theory of law seem to do. He opposes the view that the essential characteristic of law lies simply in the fact that it is exercise of authority. 'Sharing a traditional liberal suspicion of legislators exercising top-down control',[43] he explicitly connects reciprocity to the ideal of the rule of law. He even denies the existence of a rational ground for asserting that a man can have a moral obligation to obey a legal rule that completely violates a fundamental principle such as legal certainty, for 'at some point obedience becomes futile.'[44]

Fuller elaborates on the work of the sociologist Simmel, who maintains that action is mutually determined, even in cases of 'superordination and subordination.'[45] Consequently, the state's position of superior power rests ultimately on a tacit and relatively stable reciprocity.[46] There is a tacit reciprocity between government and the citizens with respect to the observance of rules. If the citizens follow the rules government expects them to follow, they should have government's assurance that these are the rules that will be applied to their conduct. 'When this bond of reciprocity is finally and completely ruptured by government, nothing is left on which to ground the citizen's duty to observe the rules.'[47] Fuller's

---

37. C.K. Allen, *Law in the Making*, Oxford: Oxford University Press, 1961, at p. 411.
38. Th. Hobbes, *Leviathan* [1651], ed. R. Tuck, (Cambridge: Cambridge University Press, 1992), XXVI, at p. 187: the Law is 'a Command, and a Command consisteth in declaration, or manifestation of the will of him that commandeth, by voyce, writing, or some other sufficient argument of the same.'
39. Montesquieu, *The Spirit of Laws* [1748], eds. A.M. Cohler, B.C. Miller & H. Stone (Cambridge: Cambridge University Press, 1998), I, 1, at p. 3.
40. J.N. Shklar, *Montesquieu* (Oxford: Oxford University Press, 1987), at p. 71; she goes on to acknowledge that 'relation may be a somewhat vague word, but what it does not mean may be more important than what it does imply, in this case.'
41. G. Hofstede, *Culture's Consequences: Comparing Values, Behaviors, Institutions, and Organizations Across Nations* (Thousand Oaks [etc.]: Sage Publications, 2001), at p. 147. According to Hofstede, a scholar who compares cultures, law is one of the domains developed in societies through which we try to defend us against uncertainties in the behaviour of others.
42. P. Kahn, *Law and Love: The Trials of* King Lear, (New Haven and London: Yale University Press, 2000), at p. xvi.
43. K.L. Winston. 'Introduction to the Revised Edition', in: Lon L. Fuller, *The Principles of Social Order*, ed. K.L. Winston (Oxford: Hart Publishing, 2001), pp. 1-23, at p. 21.
44. L.L. Fuller, *The Morality of Law* [1964] (New Haven/London: Yale University Press, 1977), at p. 39.
45. K.H. Wolff (ed.), *The Sociology of Georg Simmel* (Glencoe (Ill.): The Free Press, 1950), at p. 183.
46. Fuller, *supra* note 44, at p. 61.
47. Fuller, *supra* note 44, at p. 40.

point of departure is law's central purpose to provide baselines for human interaction. Law serves the purpose of putting in order and facilitating human interaction. It follows that 'the existence of enacted law as an effectively functioning system depends upon the establishment of stable interactional expectancies between lawgiver and subject.'[48] In this way, Fuller draws attention to the two-sided nature of legal relationships.[49] A lawgiver, therefore, who issues unintelligible or contradictory rules, commands the impossible, or changes legal rules every minute lacks any respect for the principle of legal certainty. This lawgiver flouts the factual dependence of a legal system on the interplay of reciprocal expectancies, and thus threatens the bond of relatively stable reciprocity between government and the citizen.[50]

The importance of the interplay of reciprocal expectancies between legal actors points beyond a formal conception of the rule of law. These reciprocal expectancies are partly dependent on values and norms. Legitimate lawmaking, therefore, has to respect the values and norms shared by the people whose behaviour the law tries to guide and coordinate. These societal values and norms may become part of the legal order and thus be morally binding upon the legislator. These reciprocal values and norms are expressed in individual rights offering protected areas of action (*supra*, section 2.1.3.1). This line of reasoning accounts for a substantive conception of the rule of law. Consequently, the law is not morally neutral as to the end to which it is put. Legal principles play a crucial role in a substantive conception of the rule of law. This will be shown in the next section.

2.1.4.2. **Law and legal principles**[51]

As shown above, formal theories of law as advocated by Hayek and Raz focus on the virtue of law, regardless of the purposes it serves. The law has a specific virtue which is morally neutral in being neutral as to the end to which the instrument is put. However, as the leading contemporary philosopher of law, Ronald Dworkin points out, the concept of law refers to a social and institutional practice that has a normative dimension. The normative dimension of the institutional practice of law does not only stem from the fact that it is regulated by rules, but that it rests on certain assumptions about what can acceptably count as law.[52] In short, what counts as law is dependent on what people value in law, and that is a normative question. This fits well in with one of Hofstede's findings that (legal) rule-makers should take into account 'the values of the people whose behaviour they try to guide and influence'.

---

48. Lon L. Fuller, 'Human Interaction and the Law', in: Fuller, *supra* note 43, pp. 231-266, at p. 254. Cf. Fuller, *supra* note 44, at p. 209.
49. W.J. Witteveen, 'Rediscovering Fuller: An Introduction', in: W.J. Witteveen & W. van der Burg, eds., *Rediscovering Fuller: Essays on Implicit and Institutional Design* (Amsterdam: Amsterdam University Press, 1999), pp. 21-48, at pp. 33ff.
50. Fuller does not advocate a positivistic conception of the rule of law, though he does not have a (formal and substantive) principle of equality as one of his principles of the internal morality of law. T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 1999), at pp. 52 ff convincingly argues that Fuller's principles, as well as his claim that they make up a morality, require the principle of equality if Fuller is not to be turned into a proponent of a rather formal, positivistic conception of the rule of law (such as, for example, Joseph Raz). Fuller's first principle, the principle of generality, is one of the most important principles of the rule of law because it serves the value of equality before the law. Cf. D. Dyzenhaus, 'The Dilemma of Legality and the Moral Limits of Law', in: A. Sarat, L. Douglas & M. Merrill Umphrey, eds., *The Limits of Law* (Stanford: Stanford University Press, 2005), at pp. 109-154.
51. For an earlier version of this section, see H. Gribnau & M.R.T. Pauwels, 'Retroactivity and Tax Legislation in the Netherlands: A theoretical approach and assessment', *Rivista di Diritto Tributario Internazionale*, 2009/3. See M. Pauwels, 'Retroactive and Retrospective Tax Legislation', in this volume.
52. R Dworkin, *Justice in Robes* (Cambridge Mass./ London: Harvard University Press, 2006), at pp. 2-10.

Substantive theories of law, therefore, add content specifications which are viewed as an integrated part of the ideal of law.[53] Substantive theories of law account for the fact that the law in a given society is inevitably linked to the political values in that society. These political values codetermine the outcome of conflicts between legal certainty and other values, such as equality, or interests and policies. Moreover, political values inform the relationship and interaction between the lawmaking powers, and, therefore, the actual law in force in a society.

Dworkin offers an elaborate substantive conception of the rule of law. This enables us to account for the role of principles as standards for evaluating existing law, for this testing of established law requires a particular conception of law which gives principles a place alongside the legal rules established by legal authorities. Once the importance of principles in the body of law is clarified, we can explain that tax laws need to meet the requirements of the principle of legal certainty. Part of the explanation is the fact that one of the central concerns of law is certainty, i.e., legal certainty. Legal certainty is an ideal that law aims to realize. This idea implies that law which does not fulfill certain requirements of certainty cannot be labeled law.[54]

Dworkin opposes the view that in a true associative community people assume that the content of the established legal rules exhausts their obligations. Members of a genuine political community view rules as negotiated out of commitment to underlying principles that are themselves a source of further obligation. They 'accept that they are governed by common principles, not just by rules hammered out in political compromise.'[55] According to Dworkin, the rule of law is a discourse about values which have already deeply informed the community's understanding of itself as a community of principle. This community acts in a unified and principled manner. Rights and obligations in such a society of principle are not exhausted by 'the particular decisions the political institutions have reached but depend, more generally, on the scheme of principles those decisions presuppose and endorse.'[56] Before it is a set of particular rules, therefore, the rule of law is a set of values that shape and characterize the community in which people live. The principles are not necessarily themselves explicit; they are rather the underlying justification for the explicit rules. Dworkin applies this ideal of integrity, i.e., the requirement of principled consistency, to the legislature who should be guided by the principle of integrity in legislation. This form of integrity 'restricts what our legislators and other lawmakers may properly do in expanding or changing our public standards', such as legal rules.[57] Laws which entail on arbitrary distinctions which are the result of political compromise which ignore the relevant principles ('checkerboard statutes), for example, violate the principle of integrity in legislation. Thus, according to Dworkin's substantive theory of law, there is some limit to the arbitrariness of the distinctions which the legislature may make in its pursuit of a collective goal.[58]

Following Dworkin, a principle can be defined as a standard which is to be observed because it is 'a requirement of justice or fairness or some other dimension of morality.'[59]

---

53. Tamanaha, *supra* note 16, at pp. 102-113.
54. Radbruch argues that there is a clear minimum with regard to lawmaking. Rules or decisions that do not aim at justice and its component equality, or for that matter legal certainty, lack the very nature of law; G. Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht' [1946], in: Idem, *Rechtsphilosophie*; eds. E. Wolf & H.-P. Schneider, (Stuttgart: K.F. Koehler Verlag, 1983), p. 345. Cf. S.L.Paulson, 'Lon L. Fuller, Gustav Radbruch, and the 'Positivist' Theses', *Law and Philosophy* 13 (1994), at pp. 313-359.
55. R. Dworkin, *Law's Empire* (Cambridge (Mass.) /London: Harvard University Press, 1986), at p. 211.
56. Dworkin, *supra* note 55, at p. 211.
57. Dworkin, *supra* note 55, at p. 217.
58. R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), at p. 114.
59. Dworkin, *supra* note 58, at p. 22.

Principles may also be viewed as ideals. [60] These ideals are 'in their realization dependent on what is factually possible and on the legal possibilities as defined by other principles.'[61] However, I would like to stress the distinction between legal principles which serve legal values and moral principles which serve moral values. Therefore, a legal principle is to be observed as a standard because it is a requirement of the 'internal morality of law' (see *infra*, section 2.1.5), not so much the external, non-legal, dimension of morality. Legal principles are standards which are specific for the law (they are not purely moral principles).[62] They can go beyond rules, they can resolve conflicts between the rules, and they offer guidance for the interpretation of rules.

Since fundamental legal principles constitute the legal expressions of the basic values of a society, lawmaking should conform to legal principles. The body of laws – statute law, case law, and the decisions and regulations of the administration – should be, 'consistent in principle.'[63] This implies that law is not legitimized only because it is issued by authorized institutions. Rather, legal principles function as essential criteria of evaluation, in the sense that the legislator is bound by legal principles. Of course, legal rules should be created by authoritative bodies. At the same time, however, they ought to be consonant with the integrated whole of fundamental legal principles. Legitimacy of positive law is guaranteed by its conformity to general legal principles. Equally, the executive, implementing the – written – laws is not only bound by the law promulgated by the legislature but also by legal principles. In other words, the executive is bound by the principle of legality and by other legal principles which are sometimes (e.g. in Belgium and the Netherlands) called principles of proper administration. The latter principles may protect legitimate expectations of citizens. Here, legal certainty is seen as the trust or certainty of people that 'law will be chosen, changed and developed, and interpreted in an overall principled way.'[64] This also goes for taxation. Taxes, therefore, should be levied in accordance with fundamental legal principles and by existing laws.

However, principles may collide, for example legal certainty and legal equality may point in different directions. Colliding principles make visible which values are really at stake on a deeper level.[65] In the case of abuse or improper use of tax rules, for example, legal certainty, conceived as a principle, may constitute an argument not to change the law, and legal equality and the ability-to-pay principle may constitute an argument to change the law. Because principles do not dictate a decision or outcome but provide an argument pointing in a certain direction, the competing principles at hand ought to be balanced. According to Dworkin, to resolve the conflict between colliding principles one has to take into account the relative weight of each.[66]

---

60. Principles are pure statements of something good one wants to achieve or an evil one wants to avert. Even though principles might seem to be stated as being absolute they do not function as being absolute within a normative legal system; E. Burg, *The Model of Principles* (Amsterdam: Universiteit van Amsterdam, 2000), at pp. 98ff.
61. R. Alexy, 'Zum Begriff des Rechtprinzips' [1979], in: R. Alexy, *Recht, Vernunft, Diskurs* (Frankfurt am Main: Suhrkamp, 1995), at p. 205. See also R. Alexy, 'On the Structure of Legal Principles', *Ratio Juris* 13 (2000) 2, at pp. 294-304. Here, I will not discuss the differences between Dworkin's theory and Alexy's optimization theory of principles.
62. Actual moral principles will (co-)determine the actual content of general legal principles. See Gribnau, *supra* note 7, at p. 22.
63. R. Dworkin, *supra* note 55, at pp. 225-275.
64. Dworkin, *supra* note 55, at p. 214. At p. 227 he argues that government should treat citizens with equal concern and respect (this right is more fundamental than the right to equal treatment).
65. Cf. J. Pontier & E. Burg, *EU Principles on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters according to the Case Law of the European Court of Justice* (The Hague: T.M.C. Asser Press, 2004), at pp. 12ff.
66. Dworkin, *supra* note 58, at pp. 26-27.

Government changing its goals and its policies may involve changing (legal) regulations. This change of regulations and of the law and transition policies should not be based on a traditional command and control approach. Taking citizens seriously, a (good) governance approach is needed, instead of hierarchical top-down legislation and enforcement with a 'traditional focus on the core institutions of 'government', namely parliament, executive, administration and party politics.'[67] Van Gerven links good governance explicitly to a government's capacity to achieve citizens' goals. The idea of good governance, therefore, refers to 'the exercise of public power to pursue objectives and attain results in the interest of the people through a variety of regulative and executive processes.'[68] This also goes for legislative change, which involves colliding legal principles. The legislator should pursue his objectives within the boundaries set by fundamental principles which represent fundamental moral values. The democratic majority may favour certain legislative measures, but legal principles may set boundaries to the claims of representative politics and rule out certain legislative choices. Legislative omnipotence is not the rule of law. The principle of legal certainty, for example, may demand the protection of legitimate expectations with regard to existing law. Thus, law exists as a frame, legal principles constituting its normative core.[69]

To conclude, rules are vital to a legal system. General rules solve problems of coordination, expertise and efficiency. They reduce the uncertainty, error and controversy that result when individuals follow their own unconstrained judgement. Rules can be seen as authoritative settlements that are 'more general than the controversies and questions resolved and thus anticipate and resolve controversies and questions that have not yet arisen.'[70] Nonetheless, rules need underlying principles. Fundamental legal principles guide and constrain rule-making, rule-application and rule-following. The principle of legal certainty is one of these fundamental legal principles.

2.1.5. **Legal certainty**[71]

As the German lawyer and legal philosopher Gustav Radbruch has argued, legal certainty definitely is one of the most fundamental legal values.[72] Legal certainty has a two-fold value: one is intrinsic, the other instrumental.[73] Legal certainty's intrinsic value regards the notion of personal freedom. First and foremost, this concerns the liberty to do and not do as one pleases. This is often called 'negative liberty', the liberty to choose between alternative courses of action without interference by others.[74] People want to be sure about the legal consequences of their dealings. Certainty about the law in force enables people to make rational choices and to plan their activities at large. Taxation is an interference with the

67. S. Smismans, *Law, Legitimacy, and European Governance* (Oxford: Oxford University Press, 2004), at pp. 25-26. See also H. Gribnau, 'Improving the Legitimacy of Soft Law in EU Tax Law' (2007) 35 *Intertax* 1, at pp. 30-31
68. W. van Gerven, *The European Union: A Polity of States and Peoples* (Oxford: Hart Publishing, 2005), at p. 158.
69. Ideally, changing the law may be seen as a process of better realizing those substantive values already present in the legal order; P. Kahn, *The Reign of Law:* Marbury v. Madison *and the Construction of America* (New Haven and London: Yale University Press, 1997), at p. 62.
70. L. Alexander & E. Sherwin, *The Rule of Rules. Morality, Rules and the Dilemmas of Law* (Durham/London: Duke University Press, 2001), at p. 18; cf. F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991).
71. For an extensive treatment of legal certainty, see Arnauld, *supra* note 23.
72. Radbruch, *supra* note 36, at pp. 107-111. See Pauwels, supra note 51.
73. See J.L.M. Gribnau, 'Rechtszekerheid en overgangsrecht', in: A.O. Lubbers, H. Vording & M. Schuver-Bravenboer, eds. *Opstellen fiscaal overgangsbeleid* (Deventer: Kluwer, 2005), at pp. 82-83.
74. I. Berlin, 'Two Concepts of Liberty' [1958], in: I. Berlin, *Four Essays on Liberty*, (Oxford: Oxford University Press, 1969), at p. 122. Traditionally, the principle of legality has limited the scope of this interference, demanding a legal basis for government action, such as the levying of taxes.

right to enjoyment of property. In tax law, therefore, this certainty regards the 'reach' of tax law and the inroads upon taxpayer's property right and economic freedom, i.e. certainty with regard to his tax burden.

Here, Adam Smith's second maxim regarding taxation in general springs to mind: 'The tax which each individual is bound to pay ought to be certain, and not arbitrary.'[75] For Smith, arbitrariness is the greatest threat to liberty. Individuals have freedom in proportion to the degree to which they can predict government action. The way government will treat them should be enshrined as much as possible in general laws. Thus, established laws which offer certainty are a great security for the liberty of the taxpayers for it is known in what manner the tax administration is to proceed. Smith continues: 'The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person.'[76] Lack of certainty in tax legislation may leave people in the dark with regard to their fiscal rights and obligations.

The (negative) freedom of taxpayers is defined by the law; within the limits of the law the taxpayer has the right to arrange his circumstances in such a way that he has to pay the least possible amount of taxes. The Netherlands Supreme Court has explicitly recognized this right (e.g., in its decisions of 7 March 1982 and 19 December 1990), but in other countries it is also acknowledged. 'Like the courts in the UK and Commonwealth countries, the US courts have clearly recognised the right of taxpayers to arrange their affairs to minimise tax.'[77] Whether taxpayers want to pay the least possible amount of taxes or not, they need to plan their fiscal affairs anyway. They want to predict the amount of tax they have to pay, i.e., they want to be sure of the extent of the interference with their liberty. Thus, lack of certainty in tax law does not secure taxpayers' (negative) liberty.

Though taxation definitely constitutes an interference with taxpayers' liberty that is not the whole story. Liberty itself depends upon taxation. Smith, for example, does not see in taxation a threat to liberty – except for a very exorbitant tax. He believes that 'every tax … is to the person who pays it a badge, not of slavery, but of liberty. It denotes that he is subject to government … not the property of a master.'[78] Governments expand everyone's freedom, 'protecting us against other people's love of domination.'[79] Therefore, according to Smith, the fact that we pay taxes to support the government is but a sign and a consequence of the freedom we thereby receive. Liberty thus presupposes a legal system and taxpayer funding of a supervisory machinery for monitoring and enforcement of rights. Therefore, 'property rights depend on the state that is willing to tax and to spend.'[80] Thus, taxation protects us against interference by others, i.e., protects citizens' negative liberty. Furthermore, taxation also enhances another aspect of liberty, for government uses tax revenue to finance public goods, such as education, which contributes to people's self-determination and self-development. This aspect of liberty is commonly called 'positive liberty.' The 'positive' sense of the word 'liberty' relates to 'the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever

75. A. Smith, *The Wealth of Nations* [1776], Book V, Ch. II, Part II, (Indianapolis: Liberty Fund, 1981), at p. 825. S. Fleischacker, *On Adam Smith's* Wealth of Nations*: A Philosophical Companion*, (Princeton: Princeton University Press, 2004), at pp. 242-244.
76. Smith, *supra* note 75, at p. 825.
77. B. Arnold, 'A comparison of statutory general anti-avoidance rules and judicial general anti-avoidance doctrines as a means of controlling tax avoidance: Which is better? (What would John Tiley think?)', in: J. Avery Jones, ed., *Comparative Perspective on Revenue Law* (Cambridge: Cambridge University Press, 2008), at pp. 16-17.
78. Smith, *supra* note 75, at p. 857.
79. Fleischacker, *supra* note 75, at p. 195.
80. S. Holmes & C. Sunstein, *The Cost of Rights. Why Liberty Depends on Taxes* (New York/London: Norton, 1999), at p. 61.

kind.'[81] Positive liberty – or, referring to the capacity to make choices upon reflection, autonomy – can be conceived broadly as the possibility to self-development and to participation in shaping society and the state.[82] Tax revenues make liberty valuable and meaningful by financing public goods such as government-managed social services and employment designed to improve collective and individual well-being; without these public goods for many people liberty would remain an empty shell. Taxation makes public goods possible, thus an encroachment on property, and, therefore, (negative) liberty enhances (positive) liberty. In this way, taxation adds to the government's legitimacy, for as Dworkin argues, a legitimate government must display equal concern for each individual under its sway. At the same time government must recognize the right and responsibility of all individuals to choose how to make good lives for themselves. Taxation, therefore, may constitute a legitimate interference with taxpayers' liberty. 'The structure and level of taxation in force may invade liberty if it is unjust – if it does not show equal concern and respect for all.'[83]

Legal certainty also has an instrumental aspect, for tax legislation not only is a constraint, but often also an opportunity for taxpayers. Nowadays, the use of tax legislation for non-fiscal goals is an integral part of government policy: the instrumentalist tax legislator seduces taxpayers to behave according to his ends.[84] Consequently, tax law contains all kinds of instrumentalist incentives mostly in the form of tax reductions, e.g., in the Netherlands for commuting by bike, employee's training, day-care centres, production of Dutch movies, research and development, ecologically sound investments or the letting of rooms by private persons. Partly due to this instrumentalist use of tax legislation, taxation regards almost every aspect of human life. As a result, tax often has an important and long-term financial impact on personal decisions and actions, such as where to live, to work, how to travel and when to retire. Citizens, therefore, have to take into account the fiscal consequences of their actions and decisions, as taxes function as a budget constraint. In one way or another, taxpayers have to plan their fiscal affairs as part of the planning of their life.[85] No wonder taxpayers value legal certainty. However, ever-changing policy goals make it very hard for taxpayers to tune their decisions and plans to the ever-changing tax legislation. This uncertainty hampers taxpayers in acting as autonomous persons, i.e., to set their own ends according to which they want to live and plan their future (see *supra*, section 2.1.3.2). Of course, the instrumentalist legislation itself may already endanger this ideal of self-governance, guiding citizens to all kinds of behaviour and ends which they possibly would not have chosen themselves – without this legislation (incentives) being in force.

However, the law never offers absolute legal certainty. It is only capable of providing limited certainty. Legal rules involve classifying particular cases as instances of general terms, bringing particular situations under general rules. These rules are expressed in words, but words have a penumbra of uncertainty. General terms have 'a core of certainty and a penumbra of doubt.'[86] Therefore, some uncertainty about the meaning of the law is inevitable.

---

81. Berlin, *supra* note 74, at p. 131. Cf. J. Rawls, *A Theory of Justice* [1971] (Oxford, Oxford University Press, 1999), at pp. 176ff.
82. H. Gribnau, 'Legitimacy in Fiscal Relationships: Rule of Law and Good Governance', in: M.A. Plaza Vega et al. eds., *From Financial Law to Tax Law: Essays in Honour of prof. Amatucci* (Naples: Jovene and Temis editions, 2011), § 2.
83. R. Dworkin, *Justice for Hedgehogs* (Cambridge Mass/London: The Belknap Press of Harvard University Press, 2011), at p. 375.
84. J.L.M. Gribnau, 'Equality, Consistency, and Impartiality in Tax Legislation', in: J.L.M. Gribnau (ed.), *Legal Protection against Discriminatory Tax Legislation* (The Hague/ London/Boston: Kluwer Law International, 2003), at pp. 7-32, at pp. 25-27.
85. See also J. Hey, *Steuerplanungssicherheit als Rechtsproblem* (Cologne: Verlag Dr. Otto Schmidt, 2002), at pp. 9ff.
86. H.L.A. Hart, *The Concept of Law* [1970], Second Edition (Oxford: Clarendon Press, 1994), at p. 123.

To be sure, if we regard legal certainty as an absolute value or ideal it becomes meaningless. The value of certainty may collide with another value, for example, with equality. This collision of values is essential to values. There is no perfect, ultimate solution in which the fundamental human values are harmonized. 'We are doomed to choose, and every choice may entail an irreparable loss.'[87] Absolute legal certainty, therefore, does not exist. Absolute legal certainty would mean that law and society at large would come to a halt. However, stagnation means decline as the saying goes. In this way, the end of legal certainty would be conceived in a purely static and conservative way. This cannot be, for law would become obsolete. On the contrary, time has an pervasive impact on law. The law has to give an answer to technical, social, economic and cultural changes, modifications in behaviour, needs and interests and changing values and norms. In making clear the legal consequences of these changes, the law provides legal certainty.[88] This new law, to keep attuned to all kind of societal changes, however, is therefore, in itself a source of (new) uncertainty. This tension is inevitable, for not reacting to societal changes would also create uncertainty. The need to adapt and, therefore, to change, is part and parcel of law. Laws are liable to change. However, there are limits to change, for legal certainty is a value to be respected. 'A system of law can be permanent only if it constrains novelty.'[89] Consequently, the demands for change and legal certainty have to be balanced.

2.1.6. Aspects of legal certainty

2.1.6.1. Introduction

The concept of legal certainty is not an easy one. 'Legal certainty is by its nature diffuse, perhaps more so than any other general principle, and its precise content is difficult to pin down.'[90] It is required, therefore, to have a look at legal literature for something to hold on to. Here, distinguishing aspects of legal certainty may serve as a two-edged sword. On the one hand, to demonstrate the normative value of legal certainty I will flesh out several of its aspects. On the other hand, these aspects not only constitute normative aspects, but may be seen as criteria to evaluate lawmaking. Thus, legal certainty becomes operational as a legal tool to fight uncertainty in the legal order. However, the transformation of the principle of legal certainty into a legal tool should not lead to unrealistic expectations. As Popelier points out, realism does not mean that we are entirely in scepticism's hands. For scepticism concerning legal certainty is often due to the mistaken idea that this is a static conception requiring absolute certainty. A dynamic conception of legal certainty, however, 'preserves the required flexibility of the law while acknowledging the individual's personal freedom to decide and to develop oneself, which presupposes predictability of the legal framework.'[91]

Legal certainty may be promoted in several ways. Here, the well-known desiderata formulated by Lon Fuller spring to mind.

According to Fuller, law is the enterprise of subjecting human behaviour to rules.[92] With regard to taxation, these rules concern the individual's fair share of taxes to pay for the costs of society. Although he deals with requirements in the light of the principle of legality,

87. I. Berlin, 'The Pursuit of the Ideal', in: I. Berlin, *The Crooked Timber of Humanity* (London: John Murray, 1990), at p. 13.
88. For the distinction between certainty through law and certainty of law, see Arnauld, *supra* note 23, at pp. 89-97.
89. Kahn, *supra* note 69, at p. 68. Cf. Pauwels, *supra* note 4, p. 97.
90. T. Tridimas, *The General Principles of EU Law* (Oxford: Oxford University Press, 2006), at p. 243.
91. P. Popelier, 'Five Paradoxes on Legal Certainty and the Lawmaker', 2 *Legisprudence* (2008) 1, pp. 47-66, at p. 49.
92. Fuller, *supra* note 44, at pp. 124-125. Cf. P. Popelier, *Rechtszekerheid als beginsel van behoorlijke regelgeving* (Antwerp/Groningen: Intersentia, 1997), at pp. 194ff.

these are all also aspects of legal certainty.[93] Actually, in my view these aspects are primarily principles which serve legal certainty, for the principle of legality is instrumental to the principle of legal certainty (and equality, for that matter).[94] Here, Fuller's point of departure is that 'every exercise of the lawmaking function is accompanied by certain tacit assumptions, or implicit expectations, about the kind of product that will emerge from the legislator's efforts and the form he will give to that product.' Consequently, the content of legislation and 'the lawmaking process is itself subject to implicit laws.'[95] Thus, Fuller's desiderata constitute the 'internal morality of law', the morality that makes law possible. Serious violations of these 'canons' threaten statutes with ineffectiveness and seriously impede its acceptance as a law.[96] Fuller's appeal to the legislator to respect the 'internal morality of law' is still relevant, even more so since increasingly, 'legislation 'is not-self conscious of its limits.'[97]

I will now deal with seven of Fuller's demands, which may be labeled principles of proper lawmaking.[98] These are all requirements with regard to legislation.[99] Here, it is important to note that legal certainty is not a monolith. Moreover, aspects of legal certainty may put forward competing demands. The various principles which make up legal certainty often provide arguments which point in divergent directions. This accounts for the fact that lawmaking is a 'principled' balancing act: competing principles ought to be balanced time and again. The tension between the principle of clarity and the principle of constancy may serve as an example. On the one hand, laws should not be opaque and unintelligible; on the other hand, laws should not be changed too frequently. Clarity may demand a hard and fast rule which, however, may prove unworkable due to rapidly changing societal norms and other developments and circumstances. In order to prevent a clear rule getting out of date it should be changed in time, but this conflicts with the demand for constancy of law. These two competing principles should be reconciled, i.e., balanced.

2.1.6.2. **Generality**

First, Fuller mentions the generality of law, i.e., 'there must be rules.'[100] Without the principle of generality, as a precept of political morality, a system of law would not be a system of law at all. Generality, therefore, should be part of its normative structure.[101] General rules promote legal certainty. In a state under the rule of law it is hardly possible to control and direct human conduct without rules applying to general classes of people. The law must act impersonally; legal rules must apply to general classes and should not contain proper names. Consequently, the legislator, laying down a rule, has to determine the limits on its field of application. Thus, a normative classification is inherent in the concept of legislation:

---

93. For legal certainty conceptualized as an 'aspects concept', see Pauwels, *supra* note 51.
94. See J.L.M. Gribnau, *Rechtsbetrekking en rechtsbeginselen in het belastingrecht* (Deventer: Kluwer, 1998), at pp. 177-179.
95. L.L. Fuller, *The Anatomy of Law* [1968] (Westport: Greenwood Press, 1976), at pp. 60-61. See also G.J. Postema, 'Implicit Law', in: Witteveen & Van der Burg, *supra* note 49, at pp. 255-275.
96. See W.J. Witteveen, 'Laws of Lawmaking', in: Witteveen & Van der Burg, *supra* note 49, at pp. 312-345.
97. R.A. Macdonald, 'Legislation and Governance', in: Witteveen & Van der Burg, *supra* note 49, at p. 279.
98. P. Popelier, 'Legal Certainty and Principles of Proper Law Making', 2 *European Journal of Law Reform* (2000), at p. 325.
99. Fuller, *supra* note 44, at pp. 81-91, deals with another aspect of legal certainty, the congruence between the declared rules and the acts of the administration. This aspect regards the application of legislation, not the quality of legislation itself.
100. Fuller, *supra* note 44, at p. 46. In this section all quotations without further reference are from *The Morality of Law*, at pp. 46-80.
101. M.H. Kramer, *Objectivity and the Rule of Law* (New York [etc.]: Cambridge University Press, 2007), at pp. 114-150.

the classification always refers to the definition of the group to whom the legislative rule applies.[102] The principle of generality should be distinguished from the idea that laws should be fair, the idea being that at the very minimum there must be some general rules, 'however fair or unfair they may be.' Nonetheless, the precept of the generality of law is itself a bulwark against arbitrariness.[103]

2.1.6.3. **Promulgation**

A second requirement is the promulgation of laws. Legal rules ought to be published. Already Hobbes was well aware of the importance of this demand. '*Knowledge of the laws* depends on the legislator, who has a duty to promulgate them, for otherwise they are not laws'. In other words, 'there is no law therefore if the will of the legislator has not been declared, and this is done by promulgation.'[104] This declaration may consist in 'by voyce, writing, or some other sufficient argument of the same.'[105]

A regime of law has to disclose to the people its norms. Otherwise it cannot guide and direct human behaviour. The legal system has to render 'its mandates and other norms ascertainable by the people to whose conduct they apply.'[106] Citizens are entitled to know in advance the law, which enables them to predict the legal consequences of their behaviour, and also allows public criticism. Thus, on the one hand, citizens are given the opportunity to conform their behaviour to the terms of the laws and, on the other hand, legal rules are open to debate and challenge. A legal system which does not comply with the principle of promulgation would be inefficacious in channelling people's behaviour.

Hobbes argues that the legislator's will may be declared in various ways (e.g. by voyce, writing). But there are other variations conceivable. The legislator, for example, may announce what he intends to be his will in the near future. Of course, such an announcement of an intended legislative change does not guarantee that this legislative change will come about. Does such an announcement offer the taxpayers guidance and legal certainty? Thus, the demand that citizens are entitled to know in advance the law is not identical with the principle of promulgation, as press releases show. A press release does not qualify as a promulgation of law, and may be used to change taxpayers' expectations with regard to future law. Such announcements can be used in the implementation of new tax rules, for example tax incentives, to guide or induce the (intended) behaviour even before the legislative procedure is concluded (or even started, for that matter) and the new law is promulgated.[107] In this way, a press release is an announcement of an expected change in the law which ideally will be confirmed by the promulgation; that is, if the legislator finds sufficient political support for proposed the change.

---

102. J. Tussman and J. ten Broek, 'The Equal Protection of the Laws', *California Law Review*, Vol. 37, September 1949, No. 3, at p. 344 and Gribnau, *supra* note 84, at pp. 29-30.
103. Underlying this principle of generality is the moral demand of generalization. Cf. K. Tipke, 'Steuerrecht als Wissenschaft', in: *Gestaltung der Steuerrechtsordnung, supra* note 10, at pp. 21-56, at pp. 35-39.
104. Thomas Hobbes, *On the Citizen* [1641/1651], eds. R. Tuck & M. Silverthorne, (Cambridge: Cambridge University Press, 1998), XIV, 13, at p. 160 (Hobbes makes an exception for unwritten law, 'which needs no promulgation but the voice of nature, or natural reason, such as natural laws', at p. 161), cf. Hobbes, *supra* note 38, XXVII, at p. 203, and XXVIII, at p. 216.
105. Hobbes, *supra* note 38, XXVI, at p. 187.
106. Kramer, *supra* note 101, at p. 113. Cf. Arnauld, *supra* note 23, at pp. 168ff.
107. See J. Hey, 'Legislation 'by' Press Release', in this volume.

2.1.6.4. **Non-retroactivity**

Thirdly, Fuller deals with the problem of retroactivity. In itself 'a retroactive law is truly a monstrosity', making the governance of human conduct obsolete. To be sure, Fuller has a remarkably limited view on the meaning of the governance of human conduct. 'A tax law first enacted, let us say, in 1963 imposing a tax on financial gains realized in 1960 at a time when such gains were not yet subject to tax. Such a statute may be grossly unjust, but it cannot be said that it is, strictly speaking, retroactive.'[108] Thus, he does not account for the fact that an obligation to pay taxes cannot be reduced to the actual (moment of) payment of taxes, for, the obligation to pay taxes depends on the (preceding) occurrence of particular facts which may involve human behaviour. It is exactly this behaviour which is in need of guidance with regard to future fiscal obligations, for taxpayers should be able to plan their lives. Therefore, the fiscal consequences of their actions should be foreseeable. From this perspective, the actual payment of taxes is a mere consequence of a taxpayer's past behaviour. Retroactive tax laws seriously endanger the predictability of taxpayers' obligations.

In the context of a system of rules that are generally prospective nonetheless, situations may arise in which granting retroactive effect to legal rules, 'not only becomes tolerable, but may actually be essential to advance the cause of legality.'[109] As Fuller argues, when things go wrong a retroactive statute often becomes indispensable as a 'curative measure.' Nevertheless, as Kirchhof points out, the constitutional 'safeguard of continuity' forbids the legislator to act at variance with existing regulations and to betray citizens' confidence in the law by abruptly embarking on a new course.[110] Thus, unjustified retroactivity evidently conflicts with the demand for continuity in law. I will return to the principle of constancy of the law, or temporal consistency (section 2.1.6.7, *infra*).

Here, I will not elaborate on the principle of non-retroactivity, for this issue will be addressed with regard to tax legislation in many ways in this book. But for one thing, it is important to note that the principle of non-retroactivity is not a hard and fast rule. (Even in countries where retroactive tax laws are forbidden this goes for the concept of retrospectivity – or 'material retroactivity'; see section 1.1 of the General report, in this volume). It is really a principle, so it does not dictate a decision or outcome but provides an argument pointing in a certain direction. Colliding principles may provide arguments which outweigh the principle of non-retroactivity.[111] Furthermore, the principle of non-retroactivity enhances the legal certainty of taxpayers, but it is could be argued that sometimes a degree of legal certainty is guaranteed despite legislation having retroactive effect. As shown in the last section, the legislator may announce an intended change of tax legislation, thus offering the taxpayers guidance and legal certainty. Ideally, subsequent legislation having retro-

---

108. Fuller, *supra* note 44, at p. 59: 'Contrast with the ex post facto criminal statute a tax law first enacted, let us say, in 1963 imposing a tax on financial gains realized in 1960 at a time when such gains were not yet subject to tax. Such a statute may be grossly unjust, but it cannot be said that it is, strictly speaking, retroactive. To be sure, it places the amount of the tax on something that has happened in the past. But the only act that it requires of its addressee is a very simple one, namely, that he pay the tax demanded. This requirement operates prospectively. We do not, in other words, enact tax laws today that order a man to have paid taxes yesterday.'
109. Fuller, *supra* note 44, at p. 53.
110. P. Kirchhof, 'Rückwirkung von Steuergesetzen', *Steuer und Wirtschaft*, 3/2000, at p. 224 (cf. Kirchhof, *supra* note 162, at p. 83), and Hey, *supra* note 85, at pp. 189-194. Cf. Kahn, *supra* note 69, at p. 92: 'Law's task is to maintain the past in the present and so to construct a future that is continuous with the past.'
111. For limitations to retroactivity of tax statutes and the standards used by courts to test retroactivity, see sections 2 and 4 of the General report (in this volume). Recently the Hungarian Constitutional Court even characterized retroactive tax legislation which was unfavourable for taxpayers as an infringement of the right to human dignity; see D. Deak, 'Pioneering Decision of the Constitutional Court of Hungary to Invoke the Protection of Human Dignity in Tax Matters', (2011) 39 *Intertax* 11, pp. 534-542.

active effect till the moment of announcement does not infringe on the expectations of taxpayers. But the question is whether reality lives up to the ideal.[112]

2.1.6.5. **Clarity**

Fourthly, Fuller argues that the clarity of laws is essential to control and direct human conduct. Laws should be clear and understandable. Analogous to the second desideratum, this not only goes for external rules, but also for the rules and practices governing internal procedures of deliberation and consultation rules. Montesquieu already argued that 'the style of the laws should be simple' for it 'is essential for the words of the law to awaken the same ideas in all men.'[113] Fuller maintains that clarity of laws may sometimes be achieved by incorporating into the law common sense standards 'which have grown up in the ordinary outside legislative halls.'[114] Clarity of the law is not to be reduced to a limited quantity of rules. In some situations, having a detailed set of rules could make things simpler and add to clarity, 'if it clears up grey areas in the tax law.'[115] Legislators can craft laws with different levels of specificity to guide human behaviour, incorporating detailed rules or more general standards in the laws they write. Precision increases predictability. However, regulation through precise, specific rules does not always deliver optimal legal certainty. A prolix code of very specific rules has its drawback: it can be so difficult 'to apply that it produces lack of coordination and inefficient decision-making that determinate rules are supposed to remedy.'[116] Precision also involves costs, for example, 'information barriers for the layman, who is more likely to understand general standards than specific rules, which employ technical standards.'[117] The possibility and necessity of clearly stated laws also depends on the nature of the problem the law deals with. Lack of clarity may be inevitable with regard to very complex matters which affect only a minority of taxpayers.[118] Some tax law is extremely complex, and so, however clearly the propositions about it are expressed, users, taxpayers and officials alike, 'may still take some time to understand how it works.'[119] The courts and the administration may mend this lack of legislative clarity. The busy legislator, however, should not easily delegate the task of establishing clearly-stated rules to the courts or the

---

112. Of course, the ideal of the separation of powers is also at stake here; see Hey, *supra* note 107.
113. Montesquieu, *supra* note 39, XXIX, 16, at pp. 612-3. See Arnauld, *supra* note 23, at pp. 226-240. Cf. Tridimas, *supra* note 90, at pp. 244-246 and Hey, *supra* note 85, at pp. 547 ff.
114. Fuller, *supra* note 44, at p. 64.
115. J. Slemrod & J. Bakija, *Taxing Ourselves: A Citizen's Guide to the Debate over Taxes*, 4th Edition (Cambridge, Mass. / London: The MIT Press, 2008), at p. 159. For an introductory exposition of techniques of legislative drafting, see, for example. A.P. Dourado, 'General Report – In Search of Validity in Tax Law: The Boundaries between Creation and Application in a Rule-of-Law State', in: A.P. Dourado (ed.), *Separation of Powers in Tax Law* (Amsterdam: IBFD, 2010), pp. 27-55, at pp. 42-44.
116. Alexander & Sherwin, *supra* note 70, at p. 31. Cf. J. Braithwaite, 'Rules and Principles: A Theory of Legal Certainty', *Australian Journal of Legal Philosophy* (2002) 27, pp. 47-82 who seeks an empirical understanding of the question: 'What are the conditions where rules will deliver us more legal certainty and what are the conditions where principles will do so?' (at p. 49).
117. F. Parisi & V. Fon, *The Economics of Lawmaking* (New York/Oxford: Oxford University Press, New York [etc.], 2009), at p. 4 They also point at the costs of the over- and under-inclusive effects of legal rules. For a discussion of over- and under-inclusiveness, see H. Gribnau, 'Separation of Powers in Taxation: The Quest for Balance in the Netherlands', in: Dourado, *supra* note 115, at pp. 145-175, at p. 155.
118. Cf. Slemrod & Bakija, *supra* note 115, at p. 163 who point out that complexity should be a matter of concern, for many taxpayers with fairly simple tax returns believe that other, more sophisticated, taxpayers take advantage of the complexity to find loopholes.
119. H. Rogers, 'Drafting Legislation at the Tax Law Rewrite Project', in: C. Stefanou & H. Xanthaki, eds., *Drafting Legislation A Modern Approach* (Aldershot: Ashgate, 2008), pp. 77-90, at pp. 80-81 Cf. A. Sawyer, 'New Zealand's Tax Rewrite Programme – In Pursuit of the (Elusive) Goal of Simplicity', 103 (2007) 4 *British Tax Review*, at pp. 405-427.

administration. The democratically legitimized legislature has priority in lawmaking. This primacy of the legislature is a result of the distribution of power in a democratic system. The legislator should not shirk its responsibility and delegate its lawmaking power.

However, it is not always possible to formulate the subject matter that the law deals with in neatly tailored clear rules, or to mould it into precise concepts. Thus, the legislator may deliberately formulate rules (too) broadly, leaving it up to the courts or the tax authorities to tailor the rule more precisely.[120] Sometimes the legislator even deliberately formulates rules too broadly to put off taxpayers (*chilling effect*). Some anti-avoidance provisions to prevent tax evasion or abuse or undesirable use of tax legislation are a case in point. The result is uncertainty for taxpayers, leaving the courts large latitude to determine the application of the law. In the case of tax minimization schemes, it has been argued that uncertainty as to when the rule will be applied has an 'in terrorem effect that dampens the enthusiasm of some would-be tax manipulators but permits others to take a chance where little is at risk if the scheme fails.' All the same, there is a trade off with complexity, for such a result might 'in some areas be preferable to an ever-growing crop of detailed statutory enactments tailored to stop specific minimisation schemes.'[121]

The demand for clarity may be met with retroactive legislation. The legislator may wish to repair a lack of clarity in a certain law with retroactive effect. In some countries the legislator makes use of interpretative statutes to this end. These statutes clarify existing statutes, imposing upon courts and administration the exact interpretation of these other statutes.[122] As shown above, reconciling these two competing principles (clarity versus non-retroactivity) demands a balancing act.

2.1.6.6. **Non-contradiction**

A fifth desideratum is rather obvious: rules must not require contradictory actions. Alexander Hamilton already wrote that it 'not uncommonly happens that there are two statutes existing at one time, clashing in whole or in part with each other and neither of them containing any repealing clause or expression.'[123] Having said this, it is of course not always easy to know when a contradiction exists or how in abstract terms one should define a contradiction. Thus, a contradictory enactment occurs, when there is 'a repugnance between the words of the enactment and those of another relevant enactment, whether in the same Act or somewhere else.'[124] To obey or follow both is a logical impossibility.[125] In themselves enactments may be clear and unambiguous, but if they contradict each other they cannot be applied literally. Contradictions between fundamental rules go at the expense of the coherence – and justice – of the system as a whole.[126] Conflict may occur between legal

120. Cf. Montesquieu, *supra* note 39, XXIX, 16, at p. 613.
121. Chirelstein quoted in J. Tiley, 'Judicial Anti-avoidance Doctrines', *British Tax Review* 1988, 4, pp. 108-145, at p. 136. Cf. Braithwaite, *supra* note 116, at p. 57: 'A smorgasbord of rules engenders a cat-and-mouse legal drafting culture – of loophole closing and reopening by creative compliance.' In the same vein: J. Braithwaite, *Markets in Vice, Markets in Virtue* (Oxford/New York: Oxford University Press 2005), at p. 147.
122. Cf. B. Peeters & P. Popelier, 'Retroactive Interpretative Statutes and Validation Statutes in Tax Law', in this volume. Again, the ideal of the separation of powers may be at stake.
123. J. Madison, A. Hamilton & J. Jay, *The Federalist Papers* [1788] (London: Penguin Books, 1987), No. 78, at p. 439.
124. F. Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford: Oxford University Press, 2001), at pp. 53-54.
125. Hobbes even argued that: 'when the sovereign commandeth anything to be done against his own former law, the command, as to that particular fact, is an abrogation of the law' (Hobbes, *supra* note 38, XXVII, at p. 209). On Hobbes' view, see J.L.M. Gribnau, *Soevereiniteit en legitimiteit: Grenzen aan (fiscale) regelgeving* (Amersfoort: SDU Uitgevers, 2009), at pp. 48-50.
126. Hey, *supra* note 85, at pp. 563-564.

norms having different legal status. The decision of European Court of Human Rights in *Shchokin v. Ukraine* shows such an example of clearly conflicting legal norms, a Ministerial Decree having the force of a parliamentary law, the other being an Instruction issued by the Ukrainian Tax Inspectorate.[127] The Court 'notes that the legal relevant acts have been manifestly inconsistent with each other. As a result, the domestic authorities applied on their own discretion.'[128] In the Court's opinion, the lack of the required clarity and precision of the domestic law, offering divergent interpretations on such an important fiscal issue, did not provide adequate protection against arbitrary interference. Conflicting legal norms, therefore, are in breach of the rule of law. Baker concludes that the case reflects a general principle: 'tax laws must satisfy the basic minimum requirements of the quality of law in that they must be accessible, precise and foreseeable in their application.'[129]

One might distinguish between 'contradiction' – the presence of a proposition and its negation – and 'incompatibility', for besides a contradiction due to purely formal (logic) reasons, there is the possibility of two provisions between which a choice must be made, unless one rejects one or the other. The explanation of this incompatibility depends 'either on the nature of things or on a human decision.'[130] Here, one of the two wordings or rules must be sacrificed, which entails a compromise. Consistent use of words may preclude contradictory legislation. Moreover, the same word should be intended to have the same meaning throughout an act or connected set of acts.[131] Here, the principle of non-contradiction touches the principle of clarity. With regard to the question how to deal with a contradiction Fuller argues that when a court is confronted with statutes which contradict one another it 'must of necessity take its guidance from some principle not expressed in the statutes themselves.'[132]

The legislator may want to solve a contradiction by annulling an enactment with contradicts another. In this way, he enhances the guidance offered by the system of tax laws and legal certainty. The legislator might even want to do this by annulling an enactment retroactively. However, this may be at the detriment of taxpayers who acted upon the enactment which will be annulled. Their legitimate expectations may be violated, especially when they acted in good faith.

The demand for non-contradictory legal norms and rules and the consistent use of words should be distinguished from the ideal of integrity, i.e., the requirement of principled consistency. The legislature should consistently make operational or work out (substantive and procedural) values and principles in legislative rules, for he should be guided by the principle of integrity in legislation.[133] Principles, therefore, but also policies, should be

---

127. The Ukrainian Revenue Officers followed the Instruction in preference to the Ministerial Decree having the force of law.
128. Application Nos. 23759/03 and 37943/06, Judgment of 14 October 2010, Para. 56.
129. Ph. Baker, 'Some Recent Tax Decisions of the European Court of Human Rights', *European Taxation*, December 2010, pp. 568-569, at p. 569. He continues: 'How many tax systems of countries that are members of the Council of Europe can be said to be, in every respect, based on laws that are accessible, precise and foreseeable in their application?'
130. Ch. Perèlman & L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* [1958] (Notre Dame/London: Notre Dame University Press, 1969), at p. 196.
131. See I. McLeod, *Principles of Legislative and Regulatory Drafting* (Oxford: Hart Publishing, 2009), at p. 73.
132. Fuller, *supra* note 44, at pp. 59-60. Eliminating contradictions motivated by a pursuit of certainty through more and more precise, specific rules should not be taken for granted, as Braithwaite, *supra* note 116, at pp. 63-64 points out: 'The classic process of writing more and more specific rules over time to cover newly discovered loopholes and apparent inconsistencies makes the body of rules as a package less capable of consistent assessment.' The greater the smorgasbord of rules, 'the greater the discretion of regulators to pick and choose an enforcement cocktail tailored to meet their own objective.'
133. J.L.M. Gribnau, 'Rechtsbeginselen en evaluatie van belastingwetgeving', in: A.C. Rijkers & H. Vording, eds., *Vijf jaar Wet IB 2001* (Deventer: Kluwer, 2006), at p. 55.

consistently applied throughout the whole tax system.[134] This not only goes for the tax system in itself, but for the legal system as a whole. Different parts of the legal system should not contradict each other.[135]

2.1.6.7. **Compliability**

A further desideratum is that laws should no require the impossible. As an operative mechanism for guiding human conduct, a regime of law has to consist mainly of laws that can be followed. A legal directive, therefore, may not demand behaviour which lies beyond the capabilities of all or most citizens. Of course, several of Fuller's principles of legality, for example clarity of the law, require that it be possible for people to comply with legal rules, but the demand for compliability plays a distinctive role. This demand also regards the application of the law by officials. A law which the tax administration cannot possibly, or at disproportional cost only, apply and enforce violates the principle of compliability. The principle of compliability is associated with the 'ought'-implies-'can' tenet, 'can' taken here to mean 'be able to achieve as a matter of physical possibility.'[136] It generally warns against the imposition of legal penalties on 'people having failed to do things that are starkly beyond the physical abilities of every human being.'[137]

Judging whether a law requires the impossible, we may take 'the reasonable man' as an objective standard. This reasonable man is 'a notional person, a fictional individual who embodies the standards and by reference to which a particular legal actor can be measured.'[138] This standard is subject to historical change, for as Fuller observes 'our notions of what in fact is impossible may be determined by presuppositions about the nature of man and universe.' These presuppositions change in the course of time. And even amongst legal systems and cultures standards will vary.

The legislator who wants to offer taxpayers more guidance may consider to enhance compliability by changing an enactment retroactively. Again, however, this may involve a violation of legitimate expectations of taxpayers who acted upon the enactment which will be changed or even annulled.

2.1.6.8. **Constancy**

A last requirement with regard to legislation holds that laws should not be changed too frequently. Frequent changes make it harder for people to gear their activities to the law. Constancy of the law, temporal consistency, offers the taxpayers a reliable legal basis for their future actions. Consequently, the (tax) legislator should take into account possible future taxpayers' actions in order to enhance temporal generality or consistency of the tax laws.[139] As shown above, Smith argued that individuals have freedom in proportion to the degree to which they can predict how the government will treat them. Rapidly fluctuating laws often are unpredictable, at the cost of taxpayers' liberty.[140] This demand for the con-

---

134. For some concrete examples of value contradictions in German taxation, see Tipke, *supra* note 103, at p. 42.
135. P. Kirchhof, *Der Staat als Garant und Gegner der Freiheit* (Paderborn [etc.]: Ferdinand Schöningh, 2004), at pp. 103-108. Kirchhof, *supra* note 162, at p. 203.
136. Kramer, *supra* note 101, at p. 169.
137. Kramer, *supra* note 101, at p. 169.
138. J. Cartwright, 'The Fiction of the 'Reasonable Man'', in: *Ex Libris Hans Nieuwenhuis* (Deventer: Kluwer, 2009), at p. 143. Note that this reference-point of 'the reasonable man' embodies a legal standard, not simply a moral standard.
139. See, for example, Kirchhof, *supra* note 162, p. 3. See also Arnauld, *supra* note 23, at pp. 273ff.
140. Cf. Fleischacker, *supra* note 75, at p. 244. Cf. Hayek, *supra* note 16, at p. 208: 'The general, abstract rules […] are […] essentially long-term measures'.

stancy of the law directly serves the predictability of legislation and the legislator's reliability.

The sixteenth-century French philosopher Montaigne elucidates this point. He clearly valued continuity in rules and laws to reduce uncertainty. This is not to say that he was unworldly. Montaigne belonged to a parliamentary milieu and he withdrew from public life by giving up his parliamentary office to write the Essays. His activity at the Bordeaux parliament concerned litigation. Hence, he was well aware of the existence of many bad laws. Nonetheless, although 'of our laws and customs there are many that are barbarous and monstrous' the worst thing in a state is the instability of the laws. Therefore, he would love 'to stop the wheel … by reason of the difficulty of reformation, and the danger of stirring things.'[141] Thus, he expressed 'a marked preference for continuity in laws and institutions over change and novelty.'[142] Unlike fashion in clothing, stable rules which promote certainty may fix themselves in the legal consciousness of the people.[143] It takes some time to internalize new rules. Therefore, one 'must not make a change in a law without sufficient reason', as Montesquieu in the same vein argued.[144] As Fuller points out, there is a close affinity between the harms resulting from too frequent changes in the law and those done by retroactive legislation. Both are caused by legislative inconstancy. Retroactive legislation, however, stretches the temporal inconsistency out to the past, changing the legal effects of past taxpayers' actions. Again, different principles (aspects) of legal certainty may provide competing arguments pointing in diverging directions. Constancy demands that laws should not be changed too easily, but a lack of clarity may demand the tax legislator to tailor the rule more precisely, and thus to change the rule. Here, the necessary balancing act may result in a legislative change making it easier for people to gear their activities to the law. Thus, clarity prevails over temporal consistency.

The tax legislator seems not to hold the principle of constancy in high regard. Anti-abuse measures, for example, are a major cause of frequent changes in tax law. Tax law is also seen as a political instrument, which accounts for a constant flux of tax laws.[145] Consequently, tax laws nowadays look like throw-away articles and tax legislation is unstable.[146] This lack of stability has another drawback, for it seriously affects other principles of certainty. To mention but one example, the goal of achieving simplicity, improving the readability of tax legislation, is hampered. Continual change to the underlying legislation through remedial legislation and new initiatives undermines the effort to achieve simplicity and diverts resources.[147]

2.1.7. Taking legal certainty seriously

Legal certainty is a quintessential norm in the state under the rule of law. Of course, it does not and cannot demand absolute certainty. Lawmakers should respect this fundamental legal principle. Lawmaking should be assessed against the principle of legal certainty, being

141. M. de Montaigne, 'Of Presumption', in: Montaigne, *The Essays* [1580] (Chicago [etc.]: Encyclopaedia Britannica, Inc., 1952), II. 17, at p. 319.
142. B. Fontana, *Montaigne's Politics: Authority and Governance in the* Essais (Princeton: Princeton University Press, 2007), at p. 40. She points out that France at the time had 'a hundred thousand laws … many of these laws were obsolete or redundant, some contradicted one another, and all were expressed in characteristically cryptic jargon', at p. 27.
143. Cf. W. Brugger, *Liberalismus, Pluralismus, Kommunitarismus. Studien zur Legitimation des Grundgesetzes* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), at p. 46.
144. Montesquieu, *supra* note 39, XXIX, 16, at p. 614.
145. Hey, *supra* note 85, at pp. 69ff.
146. Cf. Kirchhof, *supra* note 8, at p. 546.
147. Sawyer, *supra* note 119, at p. 424.

one of the foremost principles of proper lawmaking. However, we should not forget there is no simple harmony between principles. This also goes for the different aspects of legal certainty, which may be characterized as sub-principles. For example, legal certainty, i.e., the demand for clarity, may constitute an argument to change an unclear or outdated legal provision. On the other hand, legal certainty, demanding constancy of law, may also constitute an argument not to change the law. Therefore, case by case the arguments pro and con have to be balanced.

This balancing act is partly a cultural affair. Values and principles in law are likes rules, procedures and legal modes of reasoning related to a given culture. This also goes for the principle of legal certainty, which is deeply embedded in the institutional, doctrinal, social and cultural contexts of each country (a fact confirmed by the country reports in this volume).[148] Legal certainty is part and parcel of a legal culture, which may be defined as 'ideas, attitudes, expectations and opinions about law, held by people in some given society.'[149] Cultures differ in their view on relations that law must regulate; this applies to both social relations and relations between state and citizens. Tax law regards the latter kind of relations. Thus, (legal) culture partly determines the relative weight of values and principles to be observed when changing the tax laws, such as legal certainty, equality, human autonomy, public interest and the sovereignty of parliament.[150]

As shown above, the law never offers absolute legal certainty. Equally, legal certainty is not an absolute value or ideal. Nonetheless, the legislator should take legal certainty seriously. Nowadays tax legislation is very complex, often unclear and ever changing. Thus, tax law often falls short of the principle of legal certainty. The tax legislator frequently neglects legal certainty. Consequently, the lawgiver threatens the bond of relatively stable reciprocity between government and the citizen. This may seriously undermine taxpayers' cooperative attitude. Moreover, uncertainty increases transaction costs, such as the cost of the advice needed to 'comply with the law, including the cost of negotiating or litigating with the Revenue.'[151] Consequently, tax morale and compliance are at risk.[152]

Moreover, the need for weighing principles is not limited to the different aspects of legal certainty. It also goes for the principle of legal certainty itself in relationship to other principles, for example in order to determine the appropriateness of the use of retroactive legislation. Retroactivity of legislation can be framed as a balancing of the principle of legal certainty, on the one hand, and the interests that are served by retroactivity, on the other hand.[153] This balancing should be done taking into account the circumstances of the legislative case, for example the use of loopholes and the abuse or improper use of tax rules by taxpayers.[154] Taxpayers may deliberately search the law for uncertainty which they might take advantage of. These taxpayers apparently prefer gaming the uncertainty inherent to the

148. M. Tushnet, *Weak Courts, Strong Rights* (Princeton / Oxford: Princeton University Press, 2008), at p. 10.
149. L.M. Friedmann, *The Republic of Choice. Law, Authority and Culture* [1990] (Cambridge (Mass.)/London: Harvard University Press 1994), p. 213. Cf. R. Cotterell, *Law, Culture and Society: Legal Ideas in the Mirror of Society* (Aldershot: Ashgate, 2006), at pp. 81-97.
150. Cf. Tridimas, *supra* note 90, at p. 244: 'Continental public lawyers are more receptive to arguments based on legal certainty than English lawyers.' For the concept of 'the public interest', see M. Feintuck, *'The Public Interest' in Regulation* (Oxford: Oxford University Press, 2004).
151. Tiley, *supra* note 121, at p. 135. He also points at another problem of cost: 'the inefficiencies that can result from structuring one's business decisions in a particular way in order to avoid areas of uncertainty.'
152. Hey, *supra* note 85, at pp. 101-102. Cf. B. Torgler, *Tax Compliance and Tax Morale: A Theoretical and Empirical Analysis* (Cheltenham: Edward Elgar, 2007).
153. Pauwels, *supra* note 4, at pp. 119-144.
154. See the national reports in this volume, and Hey, *supra* note 107, and Pauwels, *supra* note 51.

law to the certainty which is also present in the same law.[155] They deliberately leave a passable road, where a toll is levied, to enter a marsh, where they think they do not have to pay that levy. But what if the legislator forces these taxpayers to take a (new) passable road – where a toll is levied? Thus, the legislator changes the rules because (some) taxpayers bend the rules. Should the legislator honour these taxpayers' expectations to travel the marsh without paying any toll? In my opinion, deliberately entering a marsh expecting to avoid paying tax does not easily establish a claim for protection of their expectations, for they are *ceteris paribus* not legitimate expectations.[156] Therefore, in my view the principle of equality prevails.

2.1.8. **Conclusion**

In this contribution, retroactive tax legislation is viewed from a wider perspective, viz., the change of the body of (tax) laws in the light of the human need for (legal) certainty. The main problem addressed was the question: which norms should guide the legislator willing to change the body of tax laws? These norms regard the legislator's use of rules, i.e., introduction, amendment and abolishment of legal rules. Rules, legal rules included, play a quintessential role in the human need for certainty. Law is one of the domains in societies through which we try to defend ourselves against uncertainties in the behavior of others, government included. Legislative rules attaching legal consequences to taxpayers' actions guide and direct taxpayers' behaviour. Thus, taxpayers can calculate their tax liability and predict the tax administration's collecting behaviour. Taxes constitute an interference with taxpayers' liberty. The more taxes are levied and the higher the tax burden, the more taxpayers need to plan their fiscal obligations.[157] Established laws which offer certainty are a great security for the liberty of the taxpayers, for lack of certainty in tax legislation may leave them in the dark with regard to their fiscal rights and obligations.

Thus, legal rules enable taxpayers to cope with uncertainties involved in the levying of taxes. Here, it is argued that the tax legislator's (retroactive) change of rules should be guided by legal principles. The legislature should consistently balance principles in order to achieve integrity in legislation. Legal principles offer guidance as to the boundaries of legislative changes, the principle of legal certainty – and its aspects, all conceptualized as (sub) principles – being one of the major principles. The principles of legal certainty each entail specific demands on the use of legal rules, which may point in divergent directions. Then, the competing principles at hand ought to be balanced. Thus, all of these different aspects of the principle of legal certainty are to be used as principles of proper lawmaking. By using these legal principles, the legislator takes the ideal of integrity in law seriously.

155. Cf. Braithwaite, *supra* note 116, at p. 58: wealthy taxpayers may opt for game-playing with rules by exploiting change and complexity. New products never conceived by the law may be created. Braithwaite argues that for multinational corporations this kind of financial engineering is 'a newer modality of a more longstanding tradition of contriving complexity in their books, organizational complexity and jurisdictional complexity.'
156. For a theoretical model to assess expectations, see Pauwels, *supra* note 51.
157. Hey, *supra* note 85, at pp. 133ff.

2.2.
Retroactive and retrospective tax legislation: a principle-based approach; a theory of 'priority principles of transitional law' and 'the method of the catalogue of circumstances'

Melvin Pauwels

2.2.1. Introduction

The principle of legal certainty is a fundamental principle of law. Citizens, taxpayers, should in general be allowed to rely on the legislation in force to plan their conduct and transactions. The government, including the legislator, should respect the principle of legal certainty. However, it is beyond discussion that the legislator should be able to change its legislation, including tax legislation. There are various justified reasons to change tax legislation, such as a change of tax policy and social and technical developments. A change in legislation could, however, infringe taxpayers' expectations raised by the existing legislation. This could especially be the case if the legislator decides that the amended legislation is applicable to past tax periods (the change has 'retroactive effect'). But also if the amended legislation has 'immediate effect' and therefore only applies to future taxable events or tax periods, taxpayers' expectations could be at stake. This would be the case if the legislator does not provide for grandfathering. Then, the changed legislation also applies to future effects of a situation that arose under the old legislation (the change has 'retrospective effect').

The above in a nutshell is the problem which the tax legislator has to deal with when changing legislation. How should the tax legislator act, taking into account the colliding interests? Which method should the legislature apply in determining to what extent retroactivity and retrospectivity are acceptable when enacting tax legislation? In my PhD dissertation I dealt with this issue and I developed a framework for the tax legislator grounded on a principle-based approach.[1] This contribution presents the main lines and results of my research. It should be noted that this contribution only deals with retroactive and retrospective substantive tax legislation that is disadvantageous for taxpayers. Thus, issues like *advantageous* retroactivity and retrospectivity, *procedural* tax legislation and retroactivity of *case law* are not specifically addressed.

Lastly, for various reasons, the contribution does not deal with limits in the Constitution to transitional law, and thus not with such limits to retroactivity. First of all, countries have different constitutional limits (including no limits to the sovereignty of the legislator

1. M.R.T. Pauwels, *Terugwerkende kracht van belastingwetgeving: gewikt en gewogen* (Retroactivity of tax legislation: weighing and balancing) (Amersfoort: Sdu Uitgevers, 2009).

in this respect), while this contribution seeks to offer a general approach to deal with transitional law. Notwithstanding this, the framework I advocate in this contribution can be combined with constitutional limits. Secondly, even if there are constitutional limits, these limits usually leave room for the legislator. In general, within the constitutional boundaries, the legislator should in my view aim to make the most optimal law, thereby including the most optimal transitional law. In terms of the legal theorist Lon Fuller: there is not only a *moralitiy of duty* but also a *morality of aspiration*.[2] Therefore, a framework offers the legislator useful guidance.

2.2.2. **Overview**

This contribution deals in particular with two theoretical issues in the field of transitional law that are of special interest. The first concerns the two principles of transitional law that are generally accepted. These principles are (i) that a change in legislation should not have retroactive effect and (ii) that a change in legislation has immediate effect, without grandfathering, which implies that the legislation could be 'retrospective'. As I discuss below (section 2.2.4), from a legal certainty point of view, the distinction between retroactive effect and immediate effect (which could imply a 'retrospective effect') is not strict, but only gradual. Taking this point into account, the question arises what the justification is of the above-mentioned principles of transitional law that are generally accepted. This is the first main issue I address in this contribution.

The second main issue relates to a related subject. It is generally accepted that under certain circumstances the legislator is allowed, or even should, deviate from the above-mentioned principles of transitional law. The concept of 'legitimate expectations' has a key role in this respect. On the one hand, if no legitimate expectations are infringed, retroactivity may be permissible. On the other hand, if the immediate effect (retrospectivity) would infringe legitimate expectations, the legislator should provide for grandfathering or another transitional provision. However, the question is when expectations can be characterized as 'legitimate' and how this should be assessed. This is the second main issue I scrutinize in this contribution.

The discussion of these two issues makes up the core of this contribution. However, before these issues can be dealt with, it is necessary to outline in brief which theory of law I use as the theoretical framework. Subsequently I deal with the principle of legal certainty. I then go on to analyse the two main subjects.

2.2.3. **Theoretical framework: a principle-based approach**[3]

2.2.3.1. **Introduction**

The answer to the question which method the legislature ought to apply in determining to what extent retroactivity and retrospectivity is acceptable when enacting tax legislation depends on the legal theory that is adopted. A law and economics view will provide a different answer, or at least a different approach, than a more traditional legal view.[4] Law and

2. L.L. Fuller, *The Morality of Law* (New Haven/London: Yale University Press, 1977), at pp. 9-15.
3. See in detail Pauwels, *supra* note 1, chapter 3.
4. See for law and economics approaches on (tax) transitional law especially M.J. Graetz, 'Legal Transitions: The Case of Retroactivity in Income Tax Revision', *University of Pennsylvania Law Review* (1977), at pp. 47-87, M.J. Graetz, 'Retroactivity Revisited', *Harvard Law Review* (1985), at pp. 1820-1841, L. Kaplow, 'An Economic Analysis of Legal Transitions', *Harvard Law Review* (1986), at pp. 509-617 and D.N. Shaviro, *When Rules Change: An Economic and Political Analysis of Transition Relief and Retroactivity* (Chicago: University of Chicago Press, 2000). Note that there are some differences between these approaches.

economics scholars strongly emphasize the objective of an increase in prosperity (utilitarianism) and seem not to attach independent value to legal certainty.[5] In the more traditional legal view – called the 'old view' by law and economics scholars[6] – legal certainty has an independent value, being a key value of law. This difference already provides an indication that the evaluation of retroactivity and retrospectivity will differ.

This contribution takes, for empirical as well as normative reasons, the traditional legal view. I do not elaborate on these reasons in this contribution,[7] but in essence the reasons are that (empirically:) the practice of law (legislation, case law, an important part of the legal literature) shows that legal certainty is considered a key value of law and that (normatively:) law and the legal system should aspire to the enhancement of legal certainty, since legitimate law without legal certainty is hardly conceivable (compare Fuller's idea of the morality of law, to be discussed in section 2.2.4.2).

Furthermore, I note with respect to the law and economics view and its apparent undervaluation of the value of legal certainty that, interestingly, some economists do criticize the traditional economic standards of measurement. For example, in his recent book, the famous economist Stiglitz – winner of the 2001 Nobel Prize in economics – argues that the traditional measurement in GDP (Gross Domestic Product) is not adequate, for it fails to take into account values that are important for social welfare. In this respect, Stiglitz explicitly refers to the values of security and certainty.[8] Moreover, continuously in this book, Stiglitz criticizes assumptions on which the neo-capitalist theory ('market fundamentalism') is based, especially the theory of rational markets, of which one element is the assumption that people behave rationally. The latter idea is interesting with respect to the law and economics view on transitional law, since this view is, amongst other things, based on the – thus criticized – assumption that people have rational expectations.[9]

Notwithstanding the above, in my view, the law and economics literature on transitional law offers valuable insights *in addition to* insights of the more traditional legal literature on transitional law. I use these added value elements to improve the traditional legal theory on transitional law.

2.2.3.2. **From Radbruch to Dworkin and Alexy**

The starting point for the development of my theoretical framework is Radbruch's abstract legal theory. In short, his theory is that law ought to be directed towards the realization of the idea of law, that is *Gerechtigkeit*, and that three elements, values, can be discerned therein.[10] These values are equality (*Gleichheit*), purposiveness (*Zweckmäßigkeit*), and legal certainty (*Rechtssicherheit*). Between these values there is a tension and none of these values

---

5. Hans Gribnau and Melvin Pauwels, 'Retroactivity and Tax Legislation in the Netherlands. A theoretical approach and assessment', *International Tax Law Review* (2009), at pp. 144-145.
6. See in that respect K.D. Logue, 'Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment', *Michigan Law Review* (1996), at p. 1136 and Shaviro, *supra* note 4, at pp. 2-3.
7. See Pauwels, *supra* note 1 and Gribnau and Pauwels, *supra* note 5.
8. Joseph E. Stiglitz, *Freefall: America, Free Markets, and the Sinking of the World Economy* (New York/London: W. W. Norton & Company, 2010), chapter 10.
9. See Graetz, Legal Transitions, *supra* note 4, at p. 75, Kaplow, *supra* note 4, at pp. 523-524 and Shaviro, *supra* note 4, at p. 19. K.D. Logue, 'Legal Transitions, Rational Expectations, and Legal Progress', *Journal of Contemporary Legal Issues* (2003), at p. 221 notes that the 'rational expectations assumption' is essential in the normative economic analysis of legal rules in general.
10. G. Radbruch, *Rechtsphilosophie*. Studienausgabe, herausgegeben von Ralf Dreier und Stanley L. Paulson (Heidelberg: C.F. Müller Verlag, 2003), at pp. 34-41, 54-62 and at pp. 73-78. See for a summary and discussion of Radbruch's theory for example S. Taekema, *The Concept of Ideals in LegalTheory* (2000) PhD dissertation, Tilburg University, at pp. 50-74.

ought to be made absolute.[11] 'Die Drei Bestandteile der Rechtsidee fordern einander – aber sie widersprechen zugleich einander.'[12] Here, on this abstract level, a difference from the approach of law and economics becomes clear. As the latter approach emphasizes the purpose of increase in prosperity, this approach can be seen as a theory in which the realization of the value of purposiveness takes priority over realization of the value of legal certainty. Such an *a priori* ranking between values does not exist in Radbruch's approach.

Radbruch's theory of law can be elaborated at a less abstract level by following Dworkin's theory.[13] Dworkin considers law to be not a 'bunch of rules', but the integrity of rules and principles. Dworkin describes a legal principle as 'a standard to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.'[14] Also Alexy emphasizes the normative value of legal principles. He describes legal principles as 'optimization commands'; they are 'norms commanding that something be realized to the highest degree that is actually and legally possible.'[15] Legal principles are not purely moral principles; they are standards which are specific for the law.[16] Since fundamental legal principles constitute the legal expressions of the basic values of a society, lawmaking should conform to legal principles. The body of laws – statute law, case law, and the decisions and regulations of the administration – should be 'consistent in principle.'[17]

An important feature of a principle of law is its argumentative character and its dimension of weight.[18] A principle of law does not dictate a decision or outcome but provides an argument pointing in a certain direction. If there is a principle that provides an argument in another direction in the case concerned, the competing principles ought to be balanced.

The process of balancing of principles is an argumentative process; the relative weight of the arguments should be assessed in order to assess which principle gets priority in the case at hand. In this respect Alexy's law of balancing is relevant: 'The greater the degree of non-satisfaction of, or detriment to, one right or principle, the greater must be the importance of satisfying the other'.[19] Notwithstanding that this law of balancing is a helpful conceptual guideline, in my opinion it cannot always be fully justified as to why one result of balancing is better than the other. This phenomenon is connected with the issue of incommensurability of principles. For example, if the principle of legal certainty and the principle of equality collide in a certain case and the judge (or the legislator) rules that the first principle supersedes the second principle in the case at hand, it is not always possible to *fully* justify in rational terms why the principle of legal certainty wins in that case. Often, there is ultimately an 'unguided jump'.[20] This is caused by the absence of a common unit of

11. Radbruch, *supra* note 10, at pp. 74ff.
12. Radbruch, *supra* note 10, at p. 74.
13. Dworkin himself does not explicitly base his theory on Radbruch's theory. However, both theories can be theoretically connected in the sense that a legal principle-based theory, such as Dworkin's theory, is compatible with the legal value theory of Radbruch. See in this respect Taekema, *supra* note 10, at pp. 78-83.
14. R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), at p. 22.
15. R. Alexy, 'On the Structure of Legal Principles', *Ratio Juris* (2000), at p. 295.
16. Actual moral principles will be among the influences on the actual content of general legal principles. See H. Gribnau, 'General Introduction', in: G.T.K. Meussen, ed., *The Principle of Equality in European Taxation* (The Hague/London/Boston: Kluwer Law International, 1999).
17. R. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), at pp. 225-275.
18. Dworkin, *supra* note 14, at pp. 22-28. Compare also Alexy, *supra* note 16, at pp. 295ff, and E. Burg, *The Model of Principles* (2000), PhD dissertation, University of Amsterdam, at pp. 79-86.
19. R. Alexy, 'On Balancing and Subsumption. A Structural Comparison', *Ratio Juris* (2003), at p. 436.
20. Burg, *supra* note 18, at pp. 69 and 113.

measurement for weighing principles – principles are incommensurable.[21] Nevertheless, it can be demanded of the authority (the legislator, the judge, etc.) who balances principles that he or it be consistent in that activity.[22] Thus, the results of balancing in comparable situations should be the same, or at least should not deviate without justification.

2.2.3.3. **The case of retroactivity and retrospectivity: a balancing act**

What is the meaning of the above for the subject at hand? First of all, a main implication is that the government is bound by principles of law. After all, principles are 'standards to be observed' (Dworkin); they are optimization commands (Alexy). This also applies to the legislature when it comes to lawmaking, including the making of transitional law. Secondly, principles are not absolute. Hence, notwithstanding that the principle of legal certainty, including the principle of honouring legitimate expectations, provides strong arguments *contra* retroactivity, this does not imply that there is an absolute ban on retroactivity. In a certain case, certain interests could be served if the legislator were to grant retroactive effect to legislation. In that case the competing interests and principles should be weighed. The same applies *mutatis mutandis* for the subject of retrospectivity. Thus, the case of retroactivity and retrospectivity is *a balancing act* for the legislator. Thirdly, it should be accepted that the result of the balancing cannot always be fully accounted for. This relates to the issue of incommensurability of principles. Nevertheless, the demand for consistency of the legislator when balancing implies that if legislative situations are comparable[23] the transitional law should in principle be comparable.

2.2.4. **Retroactivity and retrospectivity in view of legal certainty**

2.2.4.1. **Introduction**

Legal certainty has a two-fold value, one is intrinsic, the other instrumental.[24] Legal certainty's intrinsic value regards the notion of personal freedom. First and foremost, this concerns the liberty to do and not do as one pleases. This is often called 'negative liberty', the liberty to choose between alternative courses of action without interference by others.[25] People want to be sure about the legal consequences of their dealings. In tax law this certainty regards the 'reach' of tax law and the inroad upon taxpayer's economic freedom, i.e. his tax burden.

Secondly, legal certainty has an instrumental aspect. Tax legislation is not only a constraint, but may also be an opportunity for taxpayers. Nowadays, the use of tax legislation for non-fiscal goals is an integral part of government policy: the instrumentalist tax legisla-

---

21. See with respect to the issue of incommensurability in law for example J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), at pp. 321-366, T.A. Aleinikoff, 'Constitutional Law in the Age of Balancing', *The Yale Law Journal* (1987), at pp. 972-976, Burg, *supra* note 19, at pp. 116-119 and T.A.O. Endicott, *Vagueness in Law* (Oxford: Oxford University Press, 2000), at pp. 41-45 en 148-155.
22. Compare Dworkin's requirement of integrity of the law, Dworkin, *supra* note 17, at pp. 165, 189 and 217-218. See for the requirement of consistency also Burg, *supra* note 18, at pp. 70-73 and at pp. 151-152.
23. This should be assessed on the basis of the principles and interests involved and the relevant circumstances of the legislative cases concerned.
24. See Gribnau and Pauwels, *supra* note 5, at pp. 143-144.
25. I. Berlin, 'Two Concepts of Liberty' [1958], in: I. Berlin, ed., *Four Essays on Liberty* (Oxford: Oxford University Press, 1969).

tor seduces taxpayers to behave according to his ends.[26] Consequently, Netherlands tax law contains all kinds of instrumentalist incentives mostly in the form of tax reductions.

Both the intrinsic and the instrumental values imply that certainty about the law enables people to make rational choices and to plan their activities at large. Thus, it is clear why legal certainty is important and what it should enable, but what does 'legal certainty' actually involve?

2.2.4.2. **The concept of legal certainty: an aspects concept**

The concept of legal certainty is not an easy one. Tridimas is right when he states: 'Legal certainty is by its nature diffuse, perhaps more so than any other general principle, and its precise content is difficult to pin down.'[27] As soon as one tries to make the concept concrete or describe what 'legal certainty' involves, one easily starts to sum up requirements: the law should be published, it should be clear, etc. In my view, the concept of legal certainty should be regarded as an 'aspects concept': a concept that consists of various aspects.[28]

Here, the well-known desiderata formulated by Lon Fuller for the sake of the 'inner morality of law' spring to mind.[29] Although Fuller deals with the desiderata in the light of the principle of legality, they are all also aspects of legal certainty.[30] These desiderata constitute the 'internal morality of law', the morality that makes law possible. Fuller's desiderata are nowadays still important. Fuller's theory is often used as a starting point for further elaboration, discussion and refinement of the principle of legal certainty.[31]

First, Fuller mentions the generality of law, i.e., 'there must be rules.' General rules promote legal certainty. In a state under the rule of law it is hardly possible to control and direct human conduct without rules applying to general classes of people. A second demand is the promulgation of laws. Legal rules ought to be published. Citizens are entitled to know the law in advance, which enables them to predict the legal consequences of their behaviour and it also allows for public criticism. Thirdly, Fuller criticizes retroactivity: in itself 'a retroactive law is truly a monstrosity'. Note, however, that also in Fuller's view there is no absolute ban on retroactivity. According to Fuller, situations may arise in which granting retroactive effect to legal rules, 'not only becomes tolerable, but may actually be essential to advance the cause of legality.' Fourth, Fuller argues that the clarity of laws is essential to control and direct human conduct. A fifth desideratum is rather obvious: rules must not require contradictory actions. A further desideratum is that laws should not require the impossible. A last requirement which regards the law itself holds that laws should not be changed too frequently. Frequent changes make it harder for people to gear their activities to the law. This demand for the constancy of the law directly serves the predictability of legislation and the legislator's reliability. As Fuller points out, there is a close affinity between the harm resulting from too frequent changes in the law and that done by retroac-

---

26. J.L.M. Gribnau, 'Equality, Consistency, and Impartiality in Tax Legislation', in J.L.M. Gribnau, ed., *Legal Protection against Discriminatory Tax Legislation: The Struggle for Equality in European Tax Law* (The Hague/London/Boston: Kluwer Law International, 2003), at pp. 25-27.
27. T. Tridimas, *The General Principles of EU Law*, (Oxford: Oxford University Press, 2006), at p. 243.
28. Pauwels, *supra* note 1, chapter 4. Compare J. Raitio, *The Principle of Legal Certainty in EC law*, (Dordrecht/Boston/London: Kluwer Academic Publishers, 2003), at p. 125, who considers the principle of legal certainty as a 'multi-faceted principle' and J. Temple Lang, 'Legal certainty and legitimate expectations as general principles of law', in: U. Bernitz et al., eds., *General Principles of European Community Law*, (Den Haag: Kluwer Law International, 2000), at p. 164 who uses the term 'umbrella principle'.
29. Fuller *supra* note 2, at pp. 46-91.
30. Gribnau and Pauwels, *supra* note 5, at pp. 145-149.
31. See, for example, the important and comprehensive study by Popelier on the principle of legal certainty: P. Popelier, *Rechtszekerheid als beginsel voor behoorlijke regelgeving*, (Antwerpen: Intersentia, 1997).

tive legislation. Both are caused by legislative inconstancy. The last demand of Fuller is for congruence between the declared rules and the acts of the administration. This aspect regards the *application* of legislation, not – as the other desiderata do – the quality of legislation itself.

In addition to Fuller's desiderata, the principle of honouring legitimate expectations raised by the law could be addressed as an aspect of legal certainty. This principle is implicitly covered by some of the desiderata, such as the standard of non-retroactivity, the demand that the laws should not be changed too frequently, and the requirement of congruence between the declared rules and the acts of the administration. However, the principle of honouring legitimate expectations raised by the law deserves explicit acknowledgment as an aspect of legal certainty.

2.2.4.3. Retroactivity in view of legal certainty

As mentioned above, the demand of non-retroactivity is an aspect of legal certainty. The principle of non-retroactivity has in my opinion a very solid basis in the principle of legal certainty. Even if the principle of non-retroactivity were not to be explicitly distinguished and characterized as an aspect of legal certainty, the other aspects of legal certainty would entail that laws should as a matter of principle not be retroactive.

First of all, the other desiderata of Fuller would imply that laws should not be retroactive. In essence, these desiderata serve the aim that the law is knowable. Knowable law enables citizens to predict the legal consequences of their actions and therefore to plan their conduct and actions. It is clear that a retroactive law is inherently not capable of doing that. After all, a citizen cannot predict the legal consequences of an action on the basis of the law that only enters into force after the action occurred.

Secondly, a retroactive law is not only incapable of enabling citizens to predict the legal consequences of their actions. A retroactive law also infringes the expectations that were raised by the former law, i.e. the law that was applicable at the moment the action was executed. A citizen expected – based on the then applicable law A – that his action would have legal consequence 'a', but at the end the legal consequences appear to be 'b', based on the retroactive law B.

2.2.4.4. Immediate effect without grandfathering (retrospectivity) in view of legal certainty

How should a law be assessed from the viewpoint of legal certainty if that law is granted immediate effect, without grandfathering? This immediate effect, without grandfathering, entails that the new law applies to all events that occur after the entering into force of the law, including the events that have their origin in actions prior to that moment. For example, suppose that a new tax rule is introduced to the effect that mortgage interest is not deductible for income tax purposes, while under the old tax rule the mortgage interest was tax deductible. Suppose further that the legislator grants immediate effect to that new rule and that he does not provide for grandfathering of existing mortgage loans. Then, the new rule is applicable to all mortgage interest that is paid after the date of entry into force, so also to interest paid on mortgage loans that were concluded prior to that date. The term 'retrospective' is used for this phenomenon.

If the above analysis with respect to retroactivity is applied to retrospectivity, it appears that the same issues arise. First of all, the 'knowability' and predictability of the law are at stake in the sense that a part of the legal consequences of an action are governed by a law that was not yet in force at the moment of that action and which the citizen could therefore not take into consideration when planning that action. I refer in this respect also to the

above-mentioned remark by Fuller on the close affinity between the demand for the constancy and the demand of non-retroactivity.

Secondly, the new law infringes the expectations which the citizen had based on the law that applied when the action was carried out. The citizen expected that mortgage interest would be deductible when he concluded the mortgage loan agreement, but that expectation is not honoured.

Thus, the principle of legal certainty offers arguments *contra* retrospectivity. In positive terms: the principle of legal certainty offers arguments *pro* grandfathering.

2.2.4.5. **The difference between retroactivity and retrospectivity: only gradual**

The above analysis shows that the arguments *contra* retroactivity are also arguments *contra* immediate effect without grandfathering (retrospectivity). It can be concluded that the distinction between retroactivity, on the one hand, and immediate effect without grandfathering (retrospectivity), on the other hand, loses relevance from the perspective of legal certainty. There is no strict distinction but only a gradual distinction. This is nowadays generally accepted in the legal literature.[32]

I note that the conclusion that the difference between retroactivity and immediate effect without grandfathering is only gradual is also supported – even strongly – in law and economics literature on transitional law, which looks at the impact of both.[33] For example, Graetz concludes that 'the distinctions commonly drawn between retroactive and prospective effective dates are illusory.'[34]

2.2.5. **Principles of transitional law: priority principles**

2.2.5.1. **Introduction: research question**

There are two principles of transitional law that are generally accepted. As far as I am aware, these principles are accepted by the legislator, by the court when it judges the legislator's transitional law, as well as in the literature. The first principle is that a change in legislation has immediate effect, without grandfathering. Hence, retrospectivity of legislation is generally accepted. The second principle of transitional law is that that a change in legislation should, as a matter of principle, not have retroactive effect.

These principles of transitional law thus involve a relatively sharp distinction between retroactive effect (in principle not permissible) and immediate effect (in principle permissible). However, section 2.2.4 of this contribution reveals that, from the perspective

---

32. See in particular Popelier, *supra* note 31, at p. 572 and P. Popelier, *Toepassing van de wet in de tijd. Vaststelling en beoordeling van temporele functies*, (Brussel: Story-Scientia, 1999), at pp. 48 and 178, as well as Pauwels, *supra* note 1, chapter 5, with references to amongst others J.E. Fisch, 'Retroactivity and legal change: an equilibrium approach', *Harvard Law Review* (1997), at pp. 1067-1070 and 1087, C. Sampford, *Retrospectivity and the Rule of Law*, (Oxford: Oxford University press, 2006), at pp. 9-37 and B. Juratowitch, *Retroactivity and the Common Law*, (Oxford: Hart Publishing, 2008), at pp. 5-13. Sampford – who uses a broad definition of retrospectivity that also covers what is called retroactivity in this contribution – concludes that 'retrospectivity does not appear to be an all-or-nothing characteristic of laws but rather is a matter of degree' and mentions 'the idea of retrospectivity as a continuum concept.'
33. In this contribution I do not elaborate on this. See Pauwels, *supra* note 1, section 5.3.4., with references to Graetz, Legal Transitions, *supra* note 4, at pp. 54-60, Kaplow, *supra* note 4, at pp. 515-519, Logue, *supra* note 6, at p. 1133, Fisch, *supra* note 32, at p. 1067 and Shaviro, *supra* note 4, at pp. 106-108.
34. Graetz, Retroactivity Revisited, *supra* note 4, at p. 1822. More nuanced Graetz, Legal Transitions, *supra* note 4, at p. 63: 'the difference in impact between a nominally retroactive change and one which is nominally prospective is often slight.'

of legal certainty and from a law and economics perspective, the difference between a change with retroactive effect and a change with immediate effect is only gradual. The question therefore arises what the justification is of the above-mentioned principles of transitional law. This section deals with this question.

2.2.5.2. Framework for transitional law: principle of legal certainty, the objective of the law, and principle of equality

In my view, the issue of principles of transitional law in tax law should be understood from an abstract framework that is formed by three major principles or, as the case may be, interests. For this triad of interests I am inspired by the above-mentioned theory of Radbruch.

The *first* principle has already been discussed above. It is the principle of legal certainty. Looked at from the point of view of legal certainty, a law should not only have no retroactive effect, but should also have no immediate effect without grandfathering. The principle of legal certainty advocates providing for grandfathering to avoid retrospectivity.

However, if the legislator provides for grandfathering, the new law does not become effective with respect to the cases that are grandfathered. Thus, the objective that is served by the new law cannot be reached to the extent that grandfathering is provided. Suppose a new law is introduced that involves extra taxes on flights by airplanes and that this law has an environmental objective. It is obvious that if existing airplanes were grandfathered, this would not serve that environmental objective. The environmental objective would be better served if the new law were to apply to all flights, including flights by existing airplanes. The *second* interest is therefore 'the objective of the law'. In particular, the law and economics literature – in my view: correctly – emphasizes that grandfathering has social costs as it entails delay and reduction of the benefits of the new law.[35]

So from the perspective of 'the objective of the law' a new law should have immediate effect without grandfathering. The objective of the law involves an argument contra grandfathering and pro retrospectivity.

With respect to the issue of retroactivity, the perspective of 'the objective of the law' does not provide an argument pro retroactivity. After all, as discussed above (section 2.2.4.3), a retroactive law *itself* is not able to guide behaviour.[36] Nonetheless, in certain situations, 'the objective of the law' could advocate retroactivity. An example is the situation in which a loophole exists in a law. If a new law is introduced to cure this loophole, the 'objective of the law' provides an argument pro retroactivity of that law. After all, to the extent taxpayers exploit the loophole, the original law fails to meet its own objective.

The *third* principle is the principle of equality. For the viewpoint of the principle of equality on transitional law, I consider to be equal those facts that *ratione materiae* fall within the scope of the new law and that occur in the same period. This definition taken into account, the principle of equality advocates *against* grandfathering. The reason is that grandfathering leads to unequal treatment of facts that fall within the scope of the new law and which occur in the same period. After all, in the case of grandfathering, the new law does not apply to certain facts that occur after the entry into force and that would *ratione materiae* fall within the scope of the new law. Applied to the example above: grandfathering

---

35. Compare Graetz, Legal Transitions, *supra* note 4, at p. 71, S. Levmore, 'The Case for Retroactive Taxation', *Journal of Legal Studies* (1993), at p. 290 and L. Kaplow, 'Transition Policy: A Conceptual Framework', *Journal of Contemporary Legal Issues* (2003), at p. 173.

36. Note that the *expectation* that a new law may be retroactive obviously may influence behaviour. Based on this notion, some law and economic authors plea for retroactivity in certain situations. For example, if taxpayers know that the tax legislator has the transitional law policy of curing loopholes in the law with retroactive effect, there is an incentive for taxpayers not to exploit new loopholes; compare Kaplow, *supra* note 4, at pp. 551, 587 and 607-610, Kaplow, *supra* note 35, at pp. 181-184 and Logue, *supra* note 9, at pp. 231-235 and 257-259.

of existing airplanes would imply that flights by new airplanes are taxed higher than flights by existing airplanes in the same period. It should be emphasized that this does not imply that the principle of equality *requires* that there should never be grandfathering. My reasoning is only that the principle of equality provides an argument *contra* grandfathering as well as that, from the perspective of the principle of equality, grandfathering needs a justification.

From the above-mentioned viewpoint of the principle of equality on transitional law, the principle of equality does not provide an argument pro or contra retroactivity. Based on another viewpoint, it could however be argued that the principle of equality may provide an argument against retroactivity. The basic idea is then that retroactivity implies that unequal cases are treated equally, as all facts that arose prior to the promulgation of the new law are treated as equal to facts arisen after the promulgation. However, in my view, this argument is in essence strongly interrelated with the argument of legal certainty. After all, the reason for considering these facts as unequal is that in the former case the law was not yet in force when the facts arose, while in the latter case the law is in force when the facts arise.

It should be noted that in a concrete legislative case of transitional law other principles or interests could also be involved in addition to the three just discussed. Such other principles are for example the principle of legality, the principle of equality of arms (which could be infringed if a retroactive law influences pending proceedings for the judiciary) and the ability-to-pay-principle. Nonetheless, these principles and interests are in my view the most important, as they are involved in almost all legislative cases of transitional law. This does not imply that other principles are not relevant. After all, these principles should indeed be taken into account in the balancing process insofar they are involved in the legislative case at hand.

With respect to the issue of retroactivity, the above shows that (i) the principle of legal certainty provides strong arguments *contra* retroactivity, (ii) the principle of equality does not provide an (additional) argument pro or contra retroactivity and (iii) from the perspective of 'the objective of the law' there *may* be an argument pro retroactivity in certain situations.

With respect to the issue of immediate effect without grandfathering, the conclusion is that (i) the principle of legal certainty advocates grandfathering, (ii) the principle of equality provides an argument *contra* grandfathering and (iii) from the perspective of 'the objective of the law' there should be no grandfathering.

2.2.5.3. **The principles of transitional law should be conceptualized as 'priority principles'**

On the basis of the above, a theoretical foundation can be given for the generally accepted principles of transitional law, viz. the principle of immediate effect without grandfathering and the principle of no retroactivity. In my view, these principles of transitional law should be conceptualized as – what I call – 'priority principles'.

The 'priority' element relates to the idea that the principles of transitional law should be regarded as the result of a process of balancing which results in the priority of one interest or principle over the other. As the analysis in the previous section shows, the three principles and interests involved provide arguments in different directions with respect to an adequate transitional law. Hence, a balancing of these principles or interests is necessary.

The principle of non-retroactivity is the result of the balancing of these principles and interests in the sense that the principle of legal certainty – that provides an argument contra retroactivity – prevails and has priority over any other interests. As to the principle of immediate effect without grandfathering, the objective of the law and the principle of equality – which provide arguments against grandfathering – outweigh the principle of legal certainty – which advocates grandfathering.

The 'principle' element of 'priority principles' refers to the fact the two results of balancing the three principles and interests are only *prima facie* results. The results – immediate effect without grandfathering and no retroactivity – are not rules: they do not dictate – as rules do – but indicate a direction, as principles do. The results should therefore not be characterized as priority *rules* but as priority *principles*. The balancing results are the results of an abstract balancing of the three principles or interests. In a concrete legislative case of transitional law, the results of balancing may differ. On the one hand, due to the circumstances of the case, one or more of the three principles or interests could have more or less weight than the weight taken into account in the abstract balancing. On the other hand, in a concrete legislative case, there could also be other principles or interests involved that should be taken into account when balancing and making transitional law.

Finally, it should be noted that the above provides a theoretical foundation for the generally accepted principles of transitional law. Based on the framework that is constituted by the principle of legal certainty, 'the objective of the law', and the principle of equality, the principle of immediate effect without grandfathering and the principle of non-retroactivity can be justified in terms of balancing results. It is, however, not possible to fully substantiate why *these* are the abstract balancing results and why for example grandfathering for one year is not a more optimal balancing result. This relates to the more general issue of incommensurability of principles, referred to in section 2.2.3.2.

2.2.6. Legitimate expectations? An approach based on 'the method of the catalogue of circumstances'

2.2.6.1. Introduction: the problem and research question

The legislator can rely on two principles of transitional law, viz. the principle of immediate effect without grandfathering and the principle of non-retroactivity. The above confirms that these principles are indeed principles and not rules. Therefore, in a concrete legislative case, there could be reasons for the legislator to deviate from these principles.

To answer the question as to whether in a concrete case there is reason to deviate from the principles of transitional law, the concept of 'legitimate expectations' has an important role. If taxpayers are deemed not to have legitimate expectations in the legislative case at hand, the principle of legal certainty has less weight and there may thus be reason to grant retroactive effect. The other way around, if immediate effect without grandfathering were to infringe upon legitimate expectations of taxpayers in the legislative case at hand, the principle of legal certainty has more weight and there is more reason to provide for grandfathering. Accordingly, the question as to whether or not taxpayers have 'legitimate expectations' plays an important role when the principles of transitional law are applied.

However, the concept of 'legitimate expectations' is generally problematic. In the first place, the term 'legitimate expectations' is often used to indicate that expectations are at stake that partially or completely *should be* honoured. If used in this way, an important step has already been passed. This is the step in which the principle of honouring legitimate expectations is balanced against any interests that advocate contra honouring the expectations ('counter-interests'). The adjective 'legitimate' then points in particular to the final result, and is useless for the answer to the question as to under which circumstances expectations should be honoured. In the second place: even if the term 'legitimate expectations' is only used for stating that it concerns expectations that are reasonable and could qualify to be honoured, the term remains a vague one. For when are expectations 'legitimate'? The latter question is the research question I deal with in this section. Though the usage does not have my preference I avoid confusion by following the usual legal terminology indicated above with regard to the term 'legitimate expectations'. Hence, 'legitimate expectations' are expectations that should be honoured.

2.2.6.2. An initial theoretical framework to approach the concept 'legitimate expectations'

The above indicates that the concept of 'legitimate expectations' is vague and somewhat problematic. The question is whether it is possible to provide some support to the legislator for assessing when the expectations at hand can be characterized as 'legitimate'. In this section an initial theoretical framework to approach the concept 'legitimate expectations' is developed.

In my view, conceptually, two steps can be discerned when it comes to the assessment of whether in a concrete case expectations are 'legitimate'. The first step concerns the question as to whether the subjective expectations in the case at hand are reasonable. If the answer is affirmative, the second step is to answer the question whether the reasonable expectations are legitimate expectations. If the answer to the latter question is also affirmative, the expectations should be honoured.

Sometimes, there is still a third step. That step concerns the question *to what extent* expectations ought to be honoured. The conclusion that the expectations at hand are legitimate does not automatically mean that the expectations ought to be fully honoured. For example, if the existence of legitimate expectations entails that the legislator should provide for grandfathering, this does not necessarily imply that the grandfathering should be unlimited in time. Grandfathering for a couple of years could be more appropriate.

The first step – from subjective expectations to reasonable expectations – concerns a process of filtering by objectification. The process of objectification takes place by taking the view of a reasonable person.[37] The second step concerns a balancing of the expectations with the 'counter-interests' (the interest that would be infringed if the expectations were to be honoured). The factors that are significant for the first step are also significant for the balancing involved in the second step. They are of influence for answering the question how important it is that the expectations are honoured. Thus, notwithstanding that the two steps can conceptually be distinguished, in practice the two steps are actually hard to discern. The third step is interrelated with the second step. After all, the question to what extent expectations ought to be honoured also concerns a process of balancing with 'counter-interests'.

This framework gives the legislator something to hold on to, but it has its limits. For example, the idea of objectification is helpful, but the question as to whether expectations are reasonable cannot be answered without information about the circumstances of the case. Further, the question as to whether expectations are legitimate cannot be considered apart from the weight of the 'counter-interests'. Which counter-interests are involved and the weight of these counter-interests also depends on the circumstances of the case. The concept of 'legitimate expectations' therefore remains a concept that is difficult to grasp in abstracto. Ultimately, the circumstances of the case are decisive.

However, is it possible to offer the legislator more than the answer 'that depends upon the circumstances of the case' with respect to his assessment of the legitimacy of expectations? To answer this question, in the next section, the Netherlands case law with respect to the principle of protection of legitimate expectations as a general principle of proper administration in tax law is examined.

---

37. Compare the 'prudent and circumspect trader' in the case law of the ECJ, for example ECJ C-37-38/02, 15 July 2004, Case *Di Lenardo en Dilexport*, para. 70. See also Raitio, *supra* note 28, at p. 218, as well as S.J. Schønberg, *Legitimate Expectations in Administrative Law*, (Oxford: Oxford University Press, 2000), at p. 6: 'An expectation is reasonable if a reasonable person acting with diligence would hold it in the relevant circumstances.'

2.2.6.3. **Method of priority rules?**

Obviously, the question how to approach the concept of 'legitimate expectations' is relevant in more areas than the field of transitional law only. For example, in the doctrine of the principle of honouring legitimate expectations as a general principle of proper administration in tax law, the judiciary has also to deal with the concept 'legitimate expectations'. Also in that field the question is when expectations should be honoured. It concerns the issue in which circumstances the principle of honouring of legitimate expectations justifies a deviation from the strict application of the legislation. In terms of balancing principles, it concerns balancing the principle of legality and the principle of honouring of legitimate expectations. Interestingly for this subject, the Netherlands Supreme Court has succeeded in developing a certain method that offers clear guidelines. This method is the method of 'priority rules'.[38] The question arises whether this method could be useful to approach the concept of 'legitimate expectations' in the field of transitional law.

The Supreme Court has distinguished several particular types of situations ('standard situations') in which the tax administration could cause taxpayers to develop expectations. The distinction is based on the origin of the expectations. Such standard situations are amongst other ones expectations raised by a policy rule of the tax administration, expectations raised by a promise of the tax inspector, and expectations raised by general information of the tax administration. For each of the standard situations, the Supreme Court has developed rules for the balancing of principles, resulting in 'priority rules'. Such a priority rule indicates under which circumstances the principle of honouring of legitimate expectations outweighs – and therefore gets priority above – the principle of legality.

To illustrate this, I refer to the priority rule for promises. This priority rule prescribes that the expectations raised by a promise are honoured (which thus implies an application that deviates from the legislation) in case (i) the taxpayer has the impression that the tax inspector takes a certain position concerning his application of the tax law, (ii) the taxpayer has told the tax inspector all relevant facts and circumstances of his case, (iii) the taxpayer may reasonably think the promise is in the spirit of the law, and (iv) the tax inspector is competent to deal with the taxpayer.

A characteristic of a priority rule is that it has the same structure as a statutory provision. Just like a statutory provision, a priority rule sets out criteria. In a concrete case, it should be verified whether all the criteria are met. If the criteria are all met, the rule applies. In that case the expectations concerned are considered legitimate and are honoured. In other words, the principle of honouring legitimate expectations then has priority above the principle of legality. If one of the criteria is not met in the case at hand, the priority rule is not applied. In that case, the principle of legality gets priority and the expectations are not honoured.

From the perspective of the question how to approach the concept of legitimate expectations, it is interesting to note that, first of all, a priority rule, in particular its criteria, provides a *selection* of the circumstances that are relevant for the standard situation concerned. The judiciary only has to investigate whether these circumstances are present in the case at hand. The judiciary does not to need to examine the presence of other circumstances. Secondly, a priority rule in fact determines which circumstances on their own are a *necessary condition* to assume 'legitimate expectations'. If one of the circumstances included in the priority rule is not present in the case at hand, the principle of legality prevails and the

38. See Richard Happé and Melvin Pauwels, 'Balancing of powers in Dutch tax law: General overview and recent developments', in: C. Evans, J. Freedman, & R. Krever, ed, *The delicate balance: Tax, discretion and the rule of law* (Amsterdam: IBFD, 2011), and, in depth, R.H. Happé, *Drie beginselen van fiscale rechtsbescherming*, (Deventer: Kluwer, 1998).

expectations at hand are not honoured. Thirdly, a priority rule determines which circumstances together are a *sufficient condition* to assume 'legitimate expectations'. If all circumstances that are included in the priority rule are present in the case at hand, the expectations are considered legitimate and are honoured. Thus, other circumstances are not relevant.

The above shows that the method of priority rules has important benefits. Notwithstanding these benefits, in my opinion, the method of priority rules is not suitable as general method in the field of transitional tax law. It may be possible to provide a priority rule for one or more specific types of situation. But as a general method, it is in my opinion too rigid in the field of transitional tax law. The situations that may arise are too varied to cover the whole field with priority rules. More flexibility is needed. This is, amongst other things, caused by the fact that in the field of transitional law the 'counter-interests' vary in number and weight depending on the circumstances of the case.

2.2.6.4. **Method of the catalogue of circumstances**

In the previous section I discussed the method of rules of priority to approach the concept of 'legitimate expectations'. I concluded that this method has important benefits, but that it is not suitable as a general method in the field of transitional law. This does not mean, however, that as to the question when expectations may be called legitimate, we are completely thrown back on the 'open' answer 'that depends upon the circumstances of the case'.

An appropriate method for approaching the concept of 'legitimate expectations' in the field of transitional law, in my opinion, is the method of the catalogue of circumstances. This method takes an intermediate position between only a non-specified reference to the circumstances of the case (an 'open group of circumstances'), on the one hand, and the method of priority rules, on the other hand. In the context of making transitional law, the method of the catalogue of circumstances means that the legislature ought to assess whether the circumstances listed in the catalogue are present in the legislative case at hand and that it must take these circumstances into consideration when balancing the various principles and interests involved. An open catalogue of circumstances is preferable to an exhaustive one because it cannot be ruled out that in a concrete case of law-making a special circumstance is present that also deserves to be taken into consideration but that is not included in the catalogue.

A difference from, and an advantage in comparison to, an 'open group of circumstances' is that the method of the catalogue of circumstances determines *which circumstances* ought to be taken into consideration (as far as they are present in the legislative case at hand). The method has this feature in common with the method of priority rules. A difference with that latter method is, however, that it still leaves open what the impact is of the circumstances. Other than in the method of priority rules, neither which circumstances are *necessary conditions* nor which circumstances together are a *sufficient condition* for expectations to be honoured has been determined. This is also caused by the fact that the weight of the 'counter-interests' is unknown.

An advantage of the method of the catalogue of circumstances is that it provides the legislator a foothold for balancing, because it is clear which circumstances the legislator in any case should take into account when balancing the colliding interests. The method also has the advantage that, to a certain extent, it urges the authority who submits a bill to parliament to provide reasons for his proposal with respect to the transitional law that is proposed in the bill. This may contribute to the transparency of the legislative proposal and may add to the quality of the balancing. The quality of the balancing may be improved

because parliament can verify whether or not the authority who submitted the bill[39] has ignored any relevant circumstances. Thus, the risk may be diminished that a particular circumstance that should be taken into account in the balancing process is ignored. Further, the quality of the balancing may be improved, because if the authority that submits the bill is urged to explain which circumstances it has taken into consideration, parliament can verify whether each of the circumstances adduced is actually present and whether each of the circumstances has indeed the impact that the authority claims it has.

2.2.6.5. The interaction between the method of the catalogue of circumstances and the priority principles of transition

Hence, in my opinion, the method of the catalogue of circumstances is an appropriate method for the legislator to approach the concept of legitimate expectations in the field of transitional law. In section 2.2.5, I argued that the legislator should apply the priority principles of transitional law, viz. the principle of immediate effect without grandfathering and the principle of non-retroactivity. I would like to emphasize that these two conclusions are neither contradictory nor inconsistent. To the contrary, they complement each other.

First of all, the priority principles of transitional law gain more significance through the catalogue of circumstances. Due to the catalogue of circumstances, it is clear which circumstances the legislator should take into account when the principles of priority are applied. Secondly, there is an interaction. As far as retroactivity is concerned, the point of departure in a concrete case of transitional law-making is that granting retroactive effect would lead to a breach of legitimate expectations. The method of the catalogue of circumstances is then used to scrutinize whether or not the circumstances of the legislative case nevertheless justify the conclusion that the expectations at hand have less weight than the 'counter-interests'. Further, conversely, as far as immediate effect without grandfathering is concerned, the point of departure in a concrete case of transitional law-making is that immediate effect without grandfathering does not lead to a breach of legitimate expectations. The method of the catalogue of circumstances is then used to scrutinize whether the circumstances of the legislative case nevertheless justify the conclusion that the expectations should be honoured by providing for grandfathering.

2.2.7. The catalogue of circumstances for making of transition law

2.2.7.1. The contents of the catalogue of circumstances

In the previous section, I advocated the method of the catalogue of circumstances to approach the concept of legitimate expectations, which concept is relevant for the application of the priority principles of transitional law. This plea for the method of the catalogue of circumstances (in combination with the priority principles of transitional law) was based on a theoretical investigation of ways to deal with the concept of legitimate expectations. The question, however, arises whether the method can actually be applied in practice. Is it possible to draft a catalogue of circumstances that the legislator should take into account in balancing the colliding interests when making transitional law? And if so, which circumstances should be included in the catalogue of circumstances, and what is the impact of each of these circumstances?

---

39. In the Netherlands, it usually is the State Secretary of Finance who draft bills and submits bills to parliament; see for example Hans Gribnau, 'Separation of Powers in Taxation: The Quest for Balance in the Netherlands', in: Ana Paula Dourado, ed., *Separation of Powers in Tax Law*, EATLP International Tax Series volume 7 (Amsterdam: IBFD, 2010) and Happé and Pauwels, *supra* note 38.

To answer these questions I scrutinized various legal sources. These sources are actual transitional law enacted by the Netherlands legislator and the related legislative history (such as Explanatory Notes to the bill, parliamentary advisory opinions on draft legislation by the Netherlands Council of State, and reports of the parliamentary debate), case law (Netherlands case law, case law of the European Court of Justice and case law of the European Court of Human Rights) and the literature (Netherlands as well as foreign). I systematically analysed these legal sources on the issue of which circumstances were considered relevant for the balancing to be made in the transitional law at hand (or – with respect to case law – for the judgment by the court with respect to the transitional law enacted). For convenience of comparison, I reasoned from a balancing of two interests: on the one hand – contra retroactivity and retrospectivity – the principle of legal certainty and, on the other hand, the interests that may be served by retroactivity or retrospectivity ('counter-interests'). Thus, for each circumstance that appeared to be relevant the relevance was assessed: does the circumstance positively or negatively influence the weight of the principle of legal certainty or of the counter-interest?

Based on this investigation and analysis I conclude that the first question can be answered in the affirmative: yes, it is possible to draft a catalogue of circumstances for making of transition law. The analysis shows that certain circumstances continuously play a role in discussions and reasoning with respect to making of transition law in the field of taxation. These circumstances should be included in the catalogue of circumstances for making of transition law. Also the second question (which circumstances?, and what is the impact of each of them?) can be answered on the basis of the research. I present the results in the table below.

Table 2-1.

Circumstance	*Remarks*	*Impact on the weight of*	
		Legal certainty	*Counter-interests*
Area of law: tax law	– 'Affects the balancing' – Type of tax also relevant – Always a counter-interest in the administration's financial interest		
	– Asymmetrical legal relationship – Negative effect on financial position of citizens – Administration directly concerned	Positive	
	– Variability tax legislation	Negative	
Announcement effects to be expected			Positive
Predictability of amendment		Negative	
	– Question of gradation – Circumstances of the case		
	Types of situation: – 'Legislation by press release' – 'Evident omission'		

Circumstance	*Remarks*	*Impact on the weight of*	
		Legal certainty	*Counter-interests*
	Factors: – Notion: relying on invariability of law not allowed: – Length of time horizon – New developments – Taxpayer's status – Place of provision in legal system – Statements by Deputy Minister for Finance – Illegal context – Imbalance or injustice		
Taxpayers' behaviour: disposition		Positive	
	– Question of gradation – Weight depending also on the nature of the transaction and the nature of the rule to be amended – Connection with damage		
Taxpayers' behaviour: tax avoidance		Negative	Positive
	– Criteria defining 'tax avoidance' difficult		
Behaviour of the government: legislature's duty of care	Particularly relevant as counter circumstance related to: – Tax avoidance – Interference by legislature in response to case law – Evident omission		
	– Infringement of proactive or reactive duty of care	Positive impact on relative weight legal certainty	
	– General counter circumstance: reason of amendment at the legislature's risk	Positive impact on relative weight legal certainty	
Behaviour of the government: statements by the government	– Statement that legislation will not be amended	Positive	
	– Statement that legislation will be amended	Negative	
Behaviour of the administration: consistency	– Circumstance that a comparable transitional situation exists for which previously transitional law had been made	Impact on the balancing of interests depends on previous transitional law	
Particulars of legislative changes	– Policy-related provision	Positive	
	– Provision in area where long-term planning is important	Positive	
	– Express statement (e.g. exemption)	Positive	
	– Time frames in statute	Positive	

Circumstance	*Remarks*	*Impact on the weight of*	
		Legal certainty	*Counter-interests*
	– Appropriate transitional regime of future changes laid down by statute	Positive	
	– Evident omission in legislation	Negative	Positive
	– Obscurity in legislation	Negative	Positive
Allocation possible to period before entry into force	Types of situations: – Inextricable connection with legal fact from the past – Recapture of past event – Compartmentalization (tax basis partly accrued in the past)	Positive	
Formalized legal status		Positive	
Possibility for adjustment	– Adjustment possible (impossible)	Negative (Positive)	
Uncompleted complex of transactions		Positive	
Damage/detriment	– Damage due to amendment	Positive	
	– Nature of damage: damage due to disposition	Positive	
	– Nature of damage: removing 'windfall profit'	Less positive	
	– Compensation for damage	Negative	

In this contribution, it is not possible to discuss this table and each of the mentioned circumstances in detail.[40] This would not only take too much room it is also not necessary for the purpose of this contribution. After all, the main goal of this contribution is to show that the method of the catalogue of circumstances is a suitable method, in combination with the priority principles of transitional law, for making of transition law.

It is nonetheless helpful to exemplify the table. Therefore, I briefly discuss two circumstances in the next section. These circumstances are (i) 'taxpayers' behaviour: tax avoidance', and (ii) 'behaviour of the government: legislature's duty of care', in particular in the situation of tax avoidance.

2.2.7.2. **Two circumstances discussed**

One of the circumstances that should be taken into account by the legislator when making transitional law is the circumstance that 'tax avoidance' occurs under the existing legislation. The table indicates that this circumstance, on the one hand, has a negative effect on the weight of the principle of legal certainty and, on the other hand, a positive effect on the weight of the counter interests. The table indicates that it is difficult to sharply define the

40. In my PhD.-dissertation I discussed each circumstance in more detail in about 150 pages in total.

concept of 'tax avoidance'. I note that in any case the concept includes 'tax abuse', but I will not expand further on this conceptual issue. I focus on the above-mentioned effects.

The negative effect on the weight of the principle of legal certainty, on the one hand, and the positive effect on the weight of the counter interests, on the other hand, thus implies that when 'tax avoidance' is present, this lowers the *relative* weight of the principle of legal certainty. In relation to the principles of transitional law this means that if anti-avoidance legislation is introduced (i) there is less reason to provide for grandfathering and (ii) there is more reason to grant retroactive effect (for example, till the moment of an announcement by the government that it will propose introducing anti-avoidance legislation; the technique of 'legislating by press release').

However, the above does not yet provide arguments for the above-mentioned effects. In my opinion, these effects have a solid theoretical basis. With respect to the principle of legal certainty, it should be noted that taxpayers who seek out the boundaries of the law and who exploit loopholes can reasonably expect that eventually the legislator will target the tax avoidance concerned. Moreover, the question can be raised whether expectations based on a loophole can fairly be regarded as 'reasonable', let alone 'legitimate'. With respect to the 'counter interests', it should be noted that there are interests that are especially served in case the anti-avoidance rule has a broad reach. First, as the purpose of the existing tax rules is undermined by the avoidance of these rules, a broad reach of the anti-avoidance rule serves that purpose. Secondly, a broad reach could enhance equality of taxpayers.[41] After all, taxpayers who are in fact in a comparable economic position could have a different tax burden depending on whether or not the taxpayer exploits the loophole in the legislation. Further, from a more extensive point of view on the principle of equality, the principle of equality is at stake, because tax avoidance comes at the expense of the other taxpayers.

Analysis of various legal sources shows that it is generally accepted that the existence of tax avoidance, or at least of tax abuse, has a negative impact on the relative weight of the principle of legal certainty. In the Netherlands, the legislative practice indicates that in the case of anti-abuse legislation the legislator usually does not provide for grandfathering and that it sometimes provides for retroactive effect. Not only in Netherlands legislative practice, but also in the legislative practice of other countries the view is apparently that retroactivity may be justified in the case of tax avoidance.[42] Furthermore, also in the academic literature it is recognized that retroactivity could be appropriate in the case of abuse or improper use of legislation.[43] Moreover, support can be found in judgments of international courts. Several decisions of the ECtHR[44] suggest that this court will not consider retroactivity of tax legislation contrary to Article 1 of Protocol No. 1 ECHR in case the legislation at stake targets tax avoidance.[45] Furthermore, the *Gemeente Leusden / Holin Groep* (C-487/01 and C-7/02) case of the ECJ is interesting. That case did not concern retroactivity but retrospectivity of a Netherlands anti-abuse measure in the field of VAT. The ECJ considered (paragraph 79): 'as regards tax avoidance, although, under the law of a Member State, a taxpayer cannot be censured for taking advantage of a provision or a lacuna in the legislation which, with-

41. E.g. in the *M.A.* case (ECtHR no. 27793/95, 10 June 2003,) the ECtHR upheld the retroactive tax legislation at stake taking into account the legislator's 'aim of ensuring equal treatment of taxpayers.'
42. See for example the Report of the Tax Law Session of the 17th Congress of the International Academy of Comparative Law, 2006: H. Ordower, 'General report', *Michigan State Journal of International Law* (2007), at p. 186.
43. See e.g. V. Thuronyi, *Comparative Tax Law* (Den Haag: Kluwer Law International, 2003), at p. 76, A. Harper, 'Tax post facto', *British Tax Review* (2006), pp. 395-399 and Sampford, *supra* note 32, at pp. 92-93 and 147-151.
44. Case No. 8531/79, 10 March 1981, *A.B.C. en D.*, Nos. 21319/93, 21449/93 and 21675/93, 23 October 1997, *National & Provincial Building Society c.s.*, and No. 27793/95, 10 June 2003, (*M.A.*).
45. Pauwels, *supra* note 1, at pp. 253 and 423, cf. P. Baker, 'Retroactive Tax Legislation and the European Convention on Human Rights', *British Tax Review* (2005), at p. 8.

out constituting an abuse, has allowed him to pay less tax, the repeal of legislation from which a person (…) has derived an advantage cannot, as such, breach a legitimate expectation based on Community law.'

The second circumstance that I would like discuss for the purpose of illustration is the circumstance 'behaviour of the government: legislature's duty of care'. This circumstance is amongst other ones relevant in the situation of tax avoidance. Notwithstanding the above, it is important that the legislator does react with sufficient speed to tax avoidance. In case the legislator neglects to combat a certain form of tax avoidance that it has known about for a long time, this has an impact on the balancing of interests with respect to retroactivity or retrospectivity. If the legislator infringes its 'duty of care' to react with sufficient speed, this has a positive impact on the relative weight of the principle of legal certainty. This can be substantiated as follows.

As mentioned above, if taxpayers seek out the boundaries of the law and exploit loopholes, they can reasonably expect that the legislator will target the tax avoidance involved. However, if the legislator does not respond by introducing legislation that targets the tax avoidance, one may argue that the weight of the principle of legal certainty increases again. The idea is that taxpayers may start to wonder whether or not the loophole concerned is indeed a loophole, as the legislator has not reacted.

A second element is that in case the legislator neglects to react with sufficient speed, it is harder to maintain that the interest that is served by retroactivity is really very weighty. After all, one could reason that the legislator definitely would have responded earlier if the interest indeed had been very weighty. A slow legislator, therefore, suggests a lack of urgency. An example is the *Stichting Goed Wonen II* judgment of the ECJ (C-376/02), concerning a case in which the instrument of 'legislation by press release' (retroactive effect until the moment of the earlier announcement by press release) was used by the Netherlands government when introducing an anti-abuse rule. Advocate General Tizzano stated that 'the retroactive effect of the amending law was not 'necessary' to achieve the aim, stated by the Netherlands Government, of combating an 'unintended use' of the tax legislation (…). Indeed, it is difficult to argue that, in a situation such as the present one, the aim of putting a stop to actions which were in themselves lawful and had been continuing for some years could be usefully pursued only by means of a law having retroactive effect. Indeed, given that in this case there was no sudden discovery of an unforeseen and unforeseeable situation, a law prohibiting 'undesirable' devices for the future alone would have made it possible to put a stop to them, whilst causing only slight economic damage (being limited in time and in any event linked to behaviour that had long been tolerated) and without seriously undermining the principle of legal certainty.' I note that it is true that the ECJ did not follow the final conclusion of the Advocate General, but this does not mean that the ECJ rejected Tizzano's reasoning. After all, when the ECJ ruled that the 'necessary'-requirement may have been met, it did not refer to the argument of combating the unintended use, but held that the aim to prevent an announcement effect might justify the retroactive effect in question.

The above shows why the table indicates that the circumstances 'behaviour of the government: legislature's duty of care' is a 'counter circumstance' if that duty of care is infringed. The circumstance 'behaviour of the government: legislature's duty of care' is mainly a correction to the impact of another circumstance. Applied to the above: the circumstance 'tax avoidance' has a negative impact on the relative weight of the principle of legal certainty, but the circumstance that the legislator infringed his duty of care calls for a correction to that impact, making the impact at least less negative. It is, however, not possible to state in general what the final impact of both circumstances is. In a concrete case both circumstances should be balanced.

A fine example of this balancing in a concrete case can be found in the Netherlands legislative practice regarding a bill that was submitted to target a particular type of tax

avoidance. In the Explanatory Memorandum the State Secretary of Finance explained why the bill provided for grandfathering (limiting the retrospectivity) although the bill concerned was an anti-abuse rule: 'With respect to the application field of a new rule, in general a new rule has immediate effect, in especial in case the new rule has an anti-abuse character. (…) On the other hand, it cannot be denied that a pure immediate effect would have undesirable consequences in the case at hand. (…) Therefore, it is proposed to provide for grandfathering to a certain extent (…). The reason is that (…) the legislator has neglected to provide for a proper regulation for years.'[46]

2.2.8. **Conclusion**

In the introduction I raised the question how the tax legislator should deal with the various colliding interests when making transitional law. In this contribution, I advocate a framework for the tax legislator, based on a principle-based approach. This framework consists of two parts.

The first part concerns the principles of transitional law. These principles are the principle of immediate effect without grandfathering and the principle of non-retroactivity. These principles are generally accepted. In this contribution, I argued that these principles should be conceptualized as 'priority principles'. With respect to the theoretical foundation of these principles, I showed that they can be regarded as the result of the abstract balancing of the three main principles (or interests) involved when making transitional law. These are the principle of legal certainty, the principle of equality and 'the objective of the law'. From this perspective, the transitional law principle of non-retroactivity is the result of the balancing in the sense the principle of legal certainty prevails and has priority over any other interests. As to the principle of immediate effect without grandfathering, the objective of the law and the principle of equality – which provide arguments against grandfathering – outweigh the principle of legal certainty – which advocates grandfathering.

The second part of the framework consists of the method of the catalogue of circumstances. In a concrete legislative case there may be reasons to deviate from the principles of transitional law. In that respect the concept of 'legitimate expectations' is important. On the one hand, if no legitimate expectations are infringed, retroactivity may permissible. On the other hand, if the immediate effect (retrospectivity) were to infringe legitimate expectations, the legislator should provide for grandfathering. The question is, however, when expectations can be considered 'legitimate'. It is argued that several steps could be distinguished. The first step – from subjective expectations to reasonable expectations – concerns a process of filtering by objectification of the expectations. This implies that the view of a reasonable person is taken. The second step concerns a balancing of the expectations with the interests that would be infringed if the expectations were to be honoured. Although these steps provide something to hold on, in the end the question cannot be answered in abstracto, but depends on the circumstances of the case. I argued that the method of the catalogue of circumstances is helpful in this respect. Such a catalogue consists of the circumstances which the legislator should take into account when balancing the colliding interests (as far as the circumstances are present in the legislative case at hand). This method not only provides the legislator a foothold for balancing, it may also contribute to the transparency and quality of the balancing during the legislative process. Finally, I showed that the method of catalogue of circumstances is not a mere theoretical idea. Based on an investigation and analysis of various legal sources, I showed that it is actually possible to draft a catalogue of circumstances that the legislator should take into account in balancing the colliding interests when making transitional law.

---

46. *Kamerstukken II* (*Parliamentary Proceedings of the House of Representatives*) 2004/05, 30 117, no. 3, at pp. 3 en 8.

Lastly, I note the following with respect to the normative and empirical support for the framework that I advocate. The combination of the priority principles of transitional law, on the one hand, and the method of the catalogue of circumstances, on the other hand, is not directly traceable in parliamentary proceedings, case law and the literature.[47] However, this combination does find strongly support in these sources. In any of these sources it becomes apparent, explicitly or implicitly, (a) that immediate effect without grandfathering and non-retroactivity are considered the starting points for making of transition law, (b) that 'legitimate expectations' do function as a correction mechanism with regard to these points of departure and (c) that certain circumstances can be pointed out that should be taken into account when balancing the colliding interests when making transitional law. Hence, the framework that I advocate is not only normative but also descriptive.

47. Note, however, that my approach has in its outline many similarities with the approach of Popelier, *supra* note 32.

2.3.
Retroactive interpretative statutes and validation statutes in tax law: an assessment in the light of legal certainty, separation of powers, and the right to a fair trial

Bruno Peeters and Patricia Popelier

2.3.1. Introduction

Within the debate on retroactivity of statutes, two categories of retroactive law draw specific attention. The first category consists of interpretative statutes, the latter of validation statutes. Both categories have some characteristics in common and raise similar constitutional questions (section 2.3.2). The assessment of these statutes in the light of the constitutional principles and values at stake, however, differs for each category (section 2.3.3.). This paper will analyse the merits and drawbacks of both categories. First, however, we need to define the exact meaning of interpretative and validation statutes (section 2.3.1), as these terms are sometimes used in an equivocal way, especially in countries where these concepts are not recognized as such by law or in the literature.

2.3.2. Definition of interpretative statutes and validation statutes

2.3.2.1. Interpretative statutes

Interpretative statutes clarify existing statutes, imposing upon courts and administration the exact interpretation of these other statutes. In this broad sense interpretative statutes are generally known in the various legal orders. They are conceived as problematic only in case these statutes do not only clarify an existing statute, but also have retroactive effect.

In countries which recognize interpretative statutes as a special legal category,[1] retroactivity is inherent to the interpretative statute. Usually[2] the interpretative statute takes effect from the day of enactment of the original statute. In Belgium and France interpretative statutes have an additional characteristic, which distinguishes them from other retroactive statutes. In these countries the *courts of cassation* (supreme courts), when ruling on a decision of a court of appeal, are obliged to apply the interpretative statute, whereas they

1. According to the national reports: Belgium, France, Greece, Italy, Luxembourg, Portugal and the UK; a special case is Spain where interpretative ministerial orders exist.
2. An exception is Greece, where interpretative statutes are subject to a constitutional time constraint on retroactivity in the case of tax charges, see E. Theocharopoulou and K. Remelis, national report for Greece.

cannot apply an ordinary retroactive statute if this statute had not taken effect at the time of pronouncement of the decision of the court of appeal.[3]

Because of this retroactive effect, statutes will only be recognized as interpretative if they comply with certain conditions. In France, Belgium and Greece, two criteria have to be met.

In the first place, the original statute has to be obscure or controversial.[4] If the meaning of a statute is clear, there is no need for an interpretative statute.

In the second place, the interpretative statute must have a declaratory character.[5] In Belgium the Constitutional Court originally gave a rather restrictive definition of interpretative statutes, accepting a statute as interpretative only if the original act from the beginning could reasonably not have been interpreted in any other way than in the meaning given to it by the interpretative statute.[6] The interpretative statute is truly declaratory without adding something new, only when that condition is met. This, however, would empty the interpretative statute of its purpose because, if the original act could reasonably not have been interpreted in any other way, there would have been no need for a clarification. Since June 2006 the Constitutional Court, however, changed its position. It accepts a statute as interpretative if it gives to the original act a meaning that the legislator intended from the beginning and that reasonably could have been inferred from that act.[7]

Thus, in clarifying an original act, interpretative statutes do add new content to the legal order. To cite Backer: '*Any interpretation can be characterized as a change in law. The effects of almost every interpretative act are to change the understanding of the underlying act.*'[8] An interpretative statute, however, does not give an unexpected turn to the meaning of the original act; it merely confirms an interpretation that could reasonably have been derived from the original act.

2.3.2.2. **Validation statutes**

Validation statutes or 'consolidation' statutes intend to support the legal consequences of an irregular act enacted by government or decentralized authorities. In the literature validation has been defined as *a technique, which enables the legislator to promote or even impose the application of a unilateral administrative act, notwithstanding its potential or claimed irregularity.*[9] This is especially useful in legal systems in which acts of parliament are not or in a lesser degree subject to judicial control. Validation statutes have the effect of neutralizing legality control of the administrative act by the courts.

---

3. For Belgium: Article 7 of the Judicial Code; Cass. 24 November 1936, *Pas.* 1936, I, 428; Cass. 4 November 1996, *Pas.* 1996, I, 411; Cass. 28 February 2000, *Pas.* 2000, I, 145. For France: see French report; Cass. Com. 28 February 1961, *Bull. Civ.* N° 52.
4. For Belgium: Cass. 7 October 1919, *Pas.* 1919, I, 218; Cass. 4 November 1996, *Pas.* 1996, I, 411. For France: Cass. Civ. 2, 20 February 1963, *Bull 2, nr. 174;* Cass. Com. 2 October 2001, *Bull.* 4, n° 156, No. 98-19681. For Greece: see E. Theocharopoulou and K. Remelis, national report for Greece.
5. For Belgium: Cass. 21 September 1956, *Pas.* 1957, I, 33; Cass. 4 November 1996, *Pas.* 1996, I, 411. For France: Cass. Civ. 2, 20 February 1963, *Bull* 2, No. 174*;* Cass. Com. 2 October 2001, *Bull.* 4, n° 156, No. 98-19681. For Greece: see E. Theocharopoulou and K. Remelis, national report for Greece. See also for this requirement: T.Ehrke-Rabel, national report for Austria.
6. Belgian Constitutional Court No. 189/2002, 19 December 2002; No. 25/2005, 2 February 2005; No. 20/2006, 1 February 2006; No. 192/2009, 26 November 2009.
7. Belgian Constitutional Court No. 102/2006, 21 June 2006.
8. L.C. Backer, 'Race, 'the Race', and the Republic: Reconceiving Judicial Authority after Bush and Gore' 51 *Cath. Univ. L. Rev.* 1074 (2002).
9. D. Renders, *La consolidation legislative de l'acte administrative unilateral* (Brussels: Bruylant, 2003) at p. 55.

The legislator can intervene at various moments: before the administrative act has been challenged before court; after the irregularity of the act has been pronounced by a court during a legal dispute; during a procedure in which the legality of the administrative act is challenged directly; after the suspension or even the annulment of the act by an administrative court. It can use various techniques to this effect.[10] It can enact:

- a statute declaring a certain irregular administrative act to be valid (validation *sensu stricto*);
- a statute ratifying an administrative act, thereby giving it the force of an act of parliament;
- a statute replicating the content of a certain irregular administrative act;
- a statute providing for a legal basis for the enactment of the administrative act;
- a statute authorizing the executive to enact with retroactive effect a new administrative act with the same content as the act which has been declared unlawful.

These validation acts usually have retroactive effect, in order to maintain all legal effects, which have already been produced by the administrative act.

Although interpretative acts and validation acts are sometimes confused, there is a clear distinction. Interpretative acts interpret existing acts enacted by the same legislator. Validation acts are acts enacted by parliament, upholding an administrative act or its content. However, both categories overlap in case the legislator ensures, by an interpretative statute, that the administrative act rests upon a sound legal basis.[11] Another example of overlap can be found in the French case law. The French Constitutional Court accepted an interpretative statute, which confirmed the interpretation given to the original tax code by a ministerial order abrogated by the Council of State.[12]

2.3.3. Interpretative and validation statutes: what they have in common

2.3.3.1. In general

Although the definitions in section 2.3.1 mark the differences between interpretative and validation statutes, both categories are similar in many ways. They have some characteristics in common and they raise similar constitutional questions.

2.3.3.2. Characteristics

Both categories constitute specific types of retroactive law. However, they differ in the same way from ordinary retroactive laws, because of their declaratory nature.

This declaratory nature defines interpretative statutes. It would be misleading to state, as has been the case in the literature and case law, that in converging with the original act, the interpretative statute is deprived of any retroactive effect.[13] The imposition of a

10. See B. Mathieu, *Les « validations » législatives* (Paris: Economica, 1987), at pp. 38-158 ; D. Renders, *La consolidation legislative de l'acte administrative unilateral* (Brussels: Bruylant, 2003) at pp. 137-270.
11. D. Renders, *La consolidation legislative de l'acte administrative unilateral* (Brussels: Bruylant, 2003) at pp. 21-22; 149-152.
12. C.C. (fr.) 84-186 DC, 29 December 1984, *Rec.* 107.
13. P. Roubier, *Le droit transitoire. Conflits des lois dans le temps* 2nd ed. (Paris: Dalloz/Sirey, 1960) at p. 245. This appears to be the position taken in Luxembourg, see A. Steichen, national report on Luxembourg. It used to be the position taken in Belgium: Cass. 7 October 1919, *Pas.* 1919, I, 218 ; Cass. 7 May 1996, *Pas.* 1996, I-155; Council of State Lommaert, No. 43.884, 31 August 1993; G. Closset-Marchal, *L'application dans le temps des lois de droit judiciaire civil* (Bruylant: Brussels, 1983) at pp. 43-45. See also J. Malherbe and P. Daenen, 'Retroactivity of Domestic Tax Laws and Tax Judgments of the European Court of Justice' (National report), Conference on 'Prohibition of tax retroactivity: national and community new tendencies', Naples, 10 November 2009, (1), at p. 9. The Belgian Constitutional Court has corrected this position, recognizing explicitly the retroactive nature of an interpretative statute and the need for justification in light of the principle of legal certainty, Const. Court No. 192/2009, 26 November 2009.

certain interpretation does add new content if alternative interpretations are equally possible. Recognition of the retroactive nature of the act has the advantage that interpretative acts are subject to constitutional restraints. In Greece, for example, interpretative statutes despite being recognized by the Constitution are subject to the constitutional provision which restricts the retroactivity of tax charges to one financial year.[14] The content of an interpretative statute, however, being implied in the wording of the original act, does not change the legal consequences of the original statute

Validation statutes likewise have declaratory effect. Instead of changing legal consequences, they attempt to uphold the legal consequences of existing administrative acts.

In both cases the declaratory nature has as a consequence that the retroactivity of the statutes in principle does not affect legitimate expectations. This aspect will be discussed below in more detail.

Both categories of statutes are intended to cure deficiencies caused by a public authority. As far as interpretative statutes are concerned, the original act was obscure or ambiguous. In the case of validation statutes the executive enacted an irregular act. In both cases, the question arises whether the burden of this kind of deficiency should be passed on to individual persons (in our case the taxpayers).

Finally, both interpretative and validation acts often bear witness to the interaction between institutions. The legislator may react by way of an interpretative statute to a turn in the case law. Likewise, judicial decisions, pronounced or expected, lead to a need for the legislator to intervene by way of validation acts. This interplay between lawmaker and courts puts at stake important constitutional values such as the separation of powers and the right to a fair trial.

2.3.3.3. **Constitutional questions**

a. In general

Interpretative and validation statutes raise various constitutional questions. The most important ones relate to the principle of legal certainty, due to their retroactive nature, and to the principle of separation of powers as well as the fundamental right to a fair trial, including the right of access to the court, due to their effect on judicial procedures.

b. Legal certainty and legitimate expectations

While retroactive laws are generally distrusted because they violate the principle of legal certainty, this principle is not so much at stake in the case of interpretative and validation statutes. For this reason, the retroactive effect of these statutes is more easily justified. Moreover, in the case of EU laws, the Court of Justice stated in *Nakajima All Precision Co.* that a retroactive clarifying provision, unlike ordinary retroactive provisions, does not require a specific statement of reasons to the extent that it cannot be regarded as a substantial alteration of the previous provision.[15] The Belgian Constitutional Court in settled case law dismisses objections against retroactive validation acts based upon the principle of legal certainty, arguing that the validation act merely consolidates an administrative act, the content of which was known to the persons concerned.[16]

Interpretative and validation statutes, instead of violating the principle of legal certainty, are often justified precisely for creating legal certainty or protecting legitimate expectations or vested rights. When the interpretations of the courts contradict each other,

14. See E. Theocharopoulou and K. Remelis, national report for Greece.
15. ECJ C-69/89, 7 May 1991, Case *Nakajima All Precision Co. Ltd v Council of the European Communities*, [1991] *ECR* I-2069.
16. Belgian Const. Court No. 139/2006, 14 September 2006; No. 44/2010, 29 April 2010.

an interpretative statute can bring clarity. This is especially the case in legal systems, such as the Belgian one, where ultimate interpretations can be pronounced by several highest courts (e.g. a supreme court or court of cassation, an administrative court and a constitutional court). Validation statutes in turn are often intended to secure legitimate expectations or vested rights based upon an administrative act the irregularity of which relates to a formal aspect rather than content.[17]

Nevertheless, in some cases, interpretative and validation acts are problematic from the perspective of legal certainty. As stated above, interpretative statutes, by imposing one specific interpretation in ambiguous or controversial cases, may ignore expectations that an alternative interpretation would be followed. These expectations are not legitimate if the original act was ambiguous or obscure.[18] However, coherent and transparent case law can make the legal consequences of an ambiguous act foreseeable. In this situation, one could argue that this case law creates legitimate expectations against which an interpretative act runs counter.[19] Hence, the European Court of Human Rights (ECtHR) does not accept that interpretative acts interfere in pendant litigation if the new interpretation is not endorsed by a majority in the case law[20] or even contradicts established case law.[21]

Validation acts while consolidating administrative acts interfere in judicial proceedings, the outcome of which may have been predictable beforehand. An illustration is to be found in the Belgian case law. Following a decision of the Court of Cassation declaring that municipality surtaxes to the federal personal income tax, introduced during the assessment year to which they apply, are retroactive and therefore, irregular, the federal legislator validated this kind of municipality tax regulations for the years 2001 until 2007. The decision of the Court of Cassation, however, could not have come as a surprise in the light of earlier case law and legal doctrine.[22] One could, therefore, argue that taxpayers could rely on the court to invalidate the municipality taxes in so far as they were retroactive so that the validation statute violated legitimate expectations. The European Court of Human Rights (ECtHR) followed a similar reasoning in the *Pressos Compania Naviera* case, condemning the retroactivity of a Belgian curative statute which reacted to a so-called turn in the case law of the Court of Cassation which, however, according to the ECtHR, should have been foreseen.[23]

c. Separation of powers

As mentioned above, in so far as interpretative and validation statutes interfere in judicial proceedings, they put at stake the principle of the separation of powers. Validation acts usually intervene in pending judicial proceedings. This may also be the case for interpretative statutes. Moreover, there is an assumption that the legislator has the power to make the law, while the judiciary has the power to interpret it.[24]

---

17. See for Belgium: Const. Court No. 55/2006, 19 April 2006;
18. This has been held by the German Constitutional Court for many years, e.g. *BVerfGE* 50, 177 (193, 194).
19. W. Schön, "Rückwirkende Klarstellungen' des Steuergesetzsgebers als Verfassungsproblem' in: K. Tipke et al, eds., *Gestaltung der Steuerrechtsordnung* (Köln: Verlag Dr. Otto Schmidt, 2010), at pp. 228-229 seems to side with this opinion in his objections to the case law of the German Supreme Finance Court.
20. ECtHR, 31 May 2011, *Maggio v. Italy*.
21. ECtHR, 7 Juni 2011, *Agrati v. Italy*.
22. M. De Jonckheere, 'Aanvullende gemeentebelasting op de personenbelasting, cassatie bevestigt, maar de wetgever 'neutraliseert" in Nederlands *Tijdschrift voor Fiscaal Recht* 355 (2009), pp.111-119; W. Vandenbruwaene, case note, 'Retroactief ingrijpen na een ommekeer in de rechtspraak', *Rechtskundig Weekblad* (2009-2010) pp. 1429-1430.
23. ECtHR, 20 November 1995, *Pressos Compania Naviera v. Belgium*.
24. See for the USA: J.R. Siegel, 'The Use of Legislative History in a System of Separated Powers', 53 *Vand. L. Rev.* (2000) at p. 1501; A.W. Kiracofe, 'The Codified Canons of Statutory Construction: A Response and Proposal to Nicholas Rosenkranz Federal Rules of Statutory Interpretation', 84 *B.U.L.Rev.* (2004) at p. 592. See for Belgium: G. Closset-Marchal, *L'application dans le temps des lois de droit judiciaire civil* (Brussels: Bruylant, 1983) at p. 41.

The problem primarily concerns intervention of the legislator in pending cases. In most legal systems, in conformity with the case law of the ECtHR, statutes are not permitted to interfere in judicial decisions which have become final.

The separation of powers argument takes an institutional perspective which is closely linked to a particular legal system.

Anglo-Saxon legal systems use a rather strict concept of separation of legislative and judicial powers. In the UK, interpretative and validation statutes are not perceived as problematic in this sense, because of the sovereignty of Parliament. As a result if Parliament decides to reverse the effect of a decision of the courts, this is perceived as merely a 'policy decision'.[25] In the USA, Congress has the power to change laws with the intention to affect the outcome of a pending case, as long as it does not determine the exact decision in a specific case.[26] This constraint also relates to retroactive legislative interpretation when applied in a specific case.[27] In the end, however, the legal system in the USA turns out being rather indulgent regarding both validation acts and interpretative statutes.[28] The distinction between a permissible retroactive changing of the rules, on the one hand, and directing a judicial decision on the other, turns out to be rather vague, allowing the legislature much room for intervention.[29] On the other side of the spectrum lies the Turkish legal system. Here, the principle of separation of powers prohibits the very notion of interpretative acts.[30]

If conceived as a system of checks and balances, however, the separation of powers principle leaves room for a balance of interests. This brings a perspective of fundamental rights, centred upon the right to a fair trial, including the right of access to a court.

In some legal systems, the separation of powers principle also relates to a clear distinction between the legislative and the executive function. This is especially relevant for validation statutes. In Germany, e.g., usurpation of executive power by the legislative branches violates the principle of separation of powers, unless there are good reasons required by the public interest.[31] However, as observed in the case law of both the Belgian and French constitutional courts, validation is not problematic in this respect if the irregularity of the administrative act consists precisely in the fact that according to the legality principle the matter should have been regulated by an act of parliament.

Finally, the separation of powers principle may relate to a vertical division of authority. In this respect, the hypothesis in which the legislator validates irregular tax acts enacted by local authorities merits some specific attention.[32] In some legal systems, the constitution explicitly protects the autonomy of local authorities. The Belgian Constitution assigns local fiscal powers to the local authorities, allowing the federal authority to interfere only in order to revoke the local taxes or to make exceptions.[33] Validation of the federal legislator,

---

25. D. Williams, national report on the UK.
26. A. Jasiak, *Constitutional Constraints on Ad Hoc Legislation* (Nijmegen: Wolf Legal Publishers, 2010) at pp. 69-70.
27. See for interpretative acts: J.R. Siegel, 'The Use of Legislative in a System of Separated Powers', 53 *Vand. L. Rev.* (2000) at p. 1501; A.W. Kiracofe, 'The Codified Canons of Statutory Construction: A Response and Proposal to Nicholas Rosenkranz Federal Rules of Statutory Interpretation', 84 *B.U.L.Rev.* (2004) at p. 592.
28. C. Crane, national report on the USA. See also W.D. Araiza, 'The Trouble with Robertson: Equal Protection, the Separation of Powers, and the Line between Statutory Amendment and Statutory Interpretation', 48 *Cath. U. L. Rev.* (1999) at p. 1058: 'Congress has often enacted laws overturning judicial interpretations of previously-enacted statutes that it believes the courts have misinterpreted'.
29. A. Jasiak, *Constitutional Constraints on Ad Hoc Legislation* (Nijmegen: Wolf Legal Publishers, 2010) at p. 296.
30. B. Yalti, national report on Turkey.
31. See A. Jasiak, *Constitutional Constraints on Ad Hoc Legislation* (Nijmegen: Wolf Legal Publishers, 2010) at pp. 117-121.
32. See D. Renders, *La consolidation legislative de l'acte administrative unilateral* (Brussels: Bruylant, 2003) at pp. 313-321.
33. Article 170, para. 3 Belgian Constitution.

however, comes down to a substitution, which is not envisaged by the Constitution. However, in these cases, validations are usually intended to confirm the will of the local authorities when they have no power to remedy the negative consequences of an annulment of the administrative act. In this respect, they acknowledge the *ratio legis* behind the constitutional provisions.

d. The right of access to the court

Retroactive statutes which affect the outcome of a judicial case may deny effective legal protection to the parties in this case. This is especially true if the state itself is party to the proceedings or has an interest in the outcome of the case. According to standing case law of the ECtHR, legislative intervention intended to influence the outcome of a pending judicial procedure violates Article 6 of the ECHR, unless this is justified by demands of general interest.[34]

This concern relates to interpretative acts,[35] especially when, as discussed above, case law and legal doctrine have created legitimate expectations that the original statute would have been interpreted in an alternative way. Thus, in *Papageorgiou*, the ECtHR held that a Greek interpretative statute violated Article 6 of the ECHR, considering that, at the time of its enactment, '*it was certainly foreseeable that the Court of Cassation would follow its recent case-law, in which it had already clarified the meaning of section 20 of Law no. 1483/1984 and which was favourable to the applicant*.'[36]

This concern relates, in particular, to validation statutes when the regime of legal protection differs depending on whether the act is enacted by the legislative branch or by the executive. In some legal systems, e.g. the UK and the Netherlands, acts of parliament cannot be challenged or can only be tested against international or EU rules. In other legal systems, constitutional review of acts of parliament is assigned to a special constitutional court. In those cases, however, the legal protection offered by the constitutional court is often less extensive than in the case of administrative decisions.[37] In Belgium, the Constitutional Court's recent stance towards validation acts is rather permissive, since according to the court, there is no loss of judicial protection as the validation act can be subjected to legal review by the constitutional court.[38] In reality, however, the legal protection offered by the judicial and administrative courts is more extensive, because unlike the Constitutional Court, they review acts for procedural guarantees, including procedural due process requirements.

2.3.4. Evaluation

2.3.4.1. In general

Interpretative and validation statutes raise similar constitutional objections from the perspective of legal certainty, separation of powers and the right to a fair trial and access to an independent court. The severity of the objections differs in each legal system, depending on the concept and constitutional value of the principles at stake. In general, however, valida-

34. Amongst others, ECtHR (Grand Chamber), 28 October 1999, *Zielinski en Pradal and Gonzalez v. France*; ECtHR, 27 April 2004, *Gorraiz Lizarraga v. Spain;* ECtHR, 14 February 2006, *Lecarpentier v. France*; ECtHR (Grand Chamber), 29 March 2006, *Scordino v. Italy*; ECtHR, 17 July 2008, *Sarnelli v. Italy*.
35. ECtHR, 9 December 1994, *Greek refineries Stan and Stratis Andreadis v. Greece*, *Publ.E.C.H.R.* Series A, No. 301-B; ECtHR, 22 October 1997, *Papageorgiou v. Greece*, *Rep.*1997-VI.
36. E.g. ECtHR, 22 October 1997, *Papageorgiou* v. Greece, *Rep.*1997-VI.
37. See for Germany: A. Jasiak, *Constitutional Constraints on Ad Hoc Legislation* (Nijmegen: Wolf Legal Publishers, 2010) at pp. 121.
38. Belgian Const. Court, 2 July 2003, No. 94/2003; 26 November 2003, No. 151/2003; 4 February 2010, No. 6/2010; 12 May 2010, Const. Court No. 55/2010.

tion statutes appear to be more controversial because the legislator using executive powers intervenes in legal proceedings in order to uphold an irregular act. Conversely, in several legal systems, interpretative acts are recognized as a concept. In the Belgian, Luxembourg and Greek Constitutions, the power to enact interpretative acts is explicitly assigned to the legislator; in Italy and Portugal they have a basis in the civil code.[39] Because the balance operating in the case of interpretative statutes differs from the one operating in the case of validation statutes, each category will be analysed separately in the following sections.

2.3.4.2. **Interpretative statutes**

As mentioned above, in Belgium, Luxembourg and Greece, interpretative statutes are explicitly recognized by the Constitution.[40] This is regarded as the application of the principle *ejus est interpretari legem cujus est condere*: only the author of the law can provide an authentic interpretation which is binding upon all citizens. In Belgium the insertion of interpretative statutes in the Constitution has been explained in the literature as an explicit departure from the old system of *référé législatif*.[41] According to this system, introduced in previous French Constitutions, in the case of a judicial conflict concerning the interpretation of a statute and under specific conditions, the case was to be referred to the legislator for a decision. In the case of interpretative statutes, the legislator no longer decides in a particular case. Instead he interferes by way of a generally binding interpretation. In the literature, this is seen as a way to guarantee the priority of the legislator to make policy decisions when some uncertainty arises about the legislative intent due to obscure phrasing of the original act, while respecting the principle of separation of powers.[42]

Nevertheless, as explained in the previous paragraph, interpretative statutes do raise some constitutional questions from the perspective of legal certainty, the separation of powers and the right to a fair trial. However, even when the interpretative statute is to the disadvantage of the taxpayer, various arguments may support the enactment of interpretative statutes.

In the first place, as already mentioned, the retroactive effect of interpretative statutes does not, in principle, infringe upon the principle of legal certainty, because the obscure or controversial nature of the original act prevented establishing legitimate expectations. Once the legislator has clearly expressed its original intention, it is difficult to conceive that, even if the interpretative statute does not have retroactive effect, the court would choose another interpretation.

Moreover, general interests can justify interpretative statutes. This is especially the case when equivocal phrasing creates a flaw abused, in particular, by taxpayers and detrimental to the financial interests of the state. Furthermore, the legislator may intend to create legal certainty in the case of a minority tendency in case law deviating from the original intention of the legislator. Finally, interpretative statutes may bring legal certainty where the validity of the original statute is put to doubt. Thus, for example, it can help to convince supranational authorities in the case of a dispute concerning the operation of the original act.

An illustration derived from Belgian practice demonstrates that this can operate in favour of the taxpayer. A Belgian bill provides an interpretation of Article 275(3) Income Tax

39. See the national reports.
40. Articles 85 and 133 of the Belgian Constitution; Article. 46 of the Luxembourg Constitution and Articles 77 and 78 of the Greek Constitution.
41. A. Eylenbosch et al., 'De pensioenleeftijd: een kwestie van interpretatie', *Tijdschrift voor Sociaal Recht* (1996) at pp. 345-346.
42. Eylenbosch et al.,*supra* note 41, at p. 347.

Code, which concerns the professional withholding tax on earned income.[43] According to Article 275(3), certain research institutions, including universities, are partially exempt from transferring to the Treasury the professional tax withheld on the salaries of their researchers. The *ratio legis* of this provision was to provide additional overall financing for those institutions that pay salaries to scientific researchers employed in Belgium. It was, however, unclear whether or not the institutions were under the obligation to reinvest the exempted funds in new research projects. According to the legislator, it had always been the legislator's intention that the exempted funds had to be used for additional investments in scientific research and not for reducing the economic cost of the existing research programme that gave rise to the aforementioned exemption. The problem was raised by the EU authorities granting research funds in order to finance certain research projects. The European Commission issued the opinion that the part of the professional withholding tax that was exempt from payment to the Treasury was not an eligible cost of the project which therefore could not be financed by European funds. The European Commission argued that the original Belgian legislation was unclear in that respect. It argued that it was impossible to grant subsidies for the amount exempt from transfer to the Treasury, because this exemption lowered the cost of the current research programme. The interpretative statute made clear that the funds of the exempted withholding tax could not be used to reduce the economic cost of the current research programme. The European authorities accepted the retroactive effect of the interpretative statute. As a consequence, they withdrew their claims *vis-à-vis* the Belgian research institutions.

We conclude that interpretative statutes despite their retroactive effect generally do not cause fundamental constitutional objections. It is, however, important to build in safeguards against possible abuse. For this reason, it is important that courts do not accept the legislator's labelling of a statute as interpretative without further inquiry.[44] If interpretative statutes do not really have an interpretative character or if established case law has already clarified an obscure original statute, the retroactive effect of the statute should be submitted to the same test as applied to ordinary retroactive laws.

In the end, the question remains whether the burden of a deficiency caused by the legislator should be passed on to the taxpayer. This question does not arise when the obscure or controversial nature of the statute was not present from the beginning, but was created by subsequent events. It does arise, however, when the original statute was obscure from the beginning. Paradoxically, the legal uncertainty resulting from an obscure statute weakens the judicial protection offered by the principle of legal certainty, because it does not enable the creation of legitimate expectations.[45] It is the responsibility of the legislator to enact clear and unequivocal laws from the start.

2.3.4.3. **Validation statutes**

It was stated above that validation acts are controversial because the legislator interferes with both the judiciary and the executive branch, in order to uphold an irregular act. The legislator, however, can have a legitimate purpose for the validation of the act. Sometimes the executive is not able to remedy the illegal situation without violating vested rights of individuals or without disturbing the continuity of public services. Also, the annulment of an illegal administrative act by administrative courts, usually with retroactive effect, may cause more damage to social and commercial life than the validation of the administrative

43. Articles 12-14 Law of 21 December 2009 containing fiscal and miscellaneous provisions.
44. As seems to be the approach of the Council of State in France, see E. de Crouy Chanel, national report on France.
45. See P. Popelier, 'Legal Certainty and Principles of Proper Law Making', 2 *Eur. J. L. Reform* 3 (2000), at p. 340.

act. This is especially the case when the illegal administrative act concerns a non-quantifiable number of cases or concerns quantifiable but irreversible situations.

However, considering the impact of validation acts on judicial control, some guarantees against arbitrariness should be built in. As in most European legal systems, the ECtHR has (directly or indirectly) become a standard for judicial review, the test set by the ECtHR concerning legislative intervention in pending judicial proceedings is of particular interest in the case of validation statutes. In legal systems where constitutional courts have the power to review acts of parliament, the courts usually accept that legislators can use this technique only in exceptional circumstances or in the case of overriding compelling motives of public interest.

The Belgian and the French constitutional courts[46] accept validations, within some constitutional restraints,[47] in the following circumstances:

- retroactive regularization of a technical matter when the administrative authority does not have the power to correct this shortcoming itself, e.g. because it is not able to take measures with retroactive effect;
- validation of an administrative act that was nullified by an administrative court when the motives of the nullification – e.g. disrespect of a formal requirement – are respected. In this respect, by validating the nullified act, the legislator restores the equal treatment of all citizens concerned;
- validation when no vested rights are violated and the retroactive effect is motivated by the necessity, in view of the severe financial consequences, to guarantee the continuity of public service;
- validation in order to put an end to uncertainty caused by contradictory court decisions;
- validation by the legislator when the claimed irregularity consists in the fact that only parliament is competent to regulate a matter so that this power could not lawfully have been delegated to or exerted by the executive;
- validation of irregular administrative regulations favourable to the taxpayer, provided there is no violation of the equality principle;
- validation intended to neutralize the devastating effect of a Supreme Court's decision accepting an overall unexpected new interpretation of a certain administrative act and putting the rights of the Treasury at stake.

While this case law generally demonstrates a sound balance of general and individual interests, two observations merit, however, some attention. The first one concerns the argument of financial interests as a compelling general interest. The other concerns procedural requirements of due process.

When accepting the budgetary impact as a justification for retroactive laws, courts usually also invoke other grounds for justification.[48] Nevertheless, national courts tend to accept quite readily that financial interests of the state justify legislative intervention.[49] The financial rights of the Treasury should not, however, be a sufficient motive for the validation of an irregular administrative act. According to the ECtHR, financial considerations *as such* do not justify retroactive legislation aiming at influencing the outcome of pending cases.[50]

---

46. See for France: *Jurisprudence du Conseil constitutionnel. Tables d'analyses au 18 juin 2010*, www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/Tables/tables_analytiques.pdf, at pp. 487-497.
47. E.g. prohibition of retroactivity in penal cases; prohibition of infringement on judicial decisions which have become final; in France also the strict interpretation of the validation act.
48. J. Malherbe and P. Daenen, 'Retroactivity of Domestic Tax Laws and Tax Judgments of the European Court of Justice', (National report), Conference on 'Prohibition of tax retroactivity: national and community new tendencies', Naples, 10 November 2009, (1), at p. 7.
49. Regarding the Belgian Constitutional Court *vis à vis* the ECtHR: P. Popelier, 'Legitimate Expectations and the Law-Maker in the Case Law of the European Court of Human Rights', *Eur. Human Rights L. Rev.* 1 (2006), at p. 24.
50. ECtHR, 28 October 1999, *Zielinski, Pradal and Gonzalez v France*.

Instead, they need supporting motivation, taking into account e.g. the legitimacy of expectations as well as the good faith of both the authorities and the taxpayer. So, for example, in *National & Provincial Building Society*, the ECtHR took into consideration that '*public-interest considerations in removing any uncertainty as to the lawfulness of the revenue collected*' outweighed individual interests of the applicant, considering its attempt to circumvent parliament's original intention.[51]

Finally, the legislator, when intervening in pending legal proceedings, should act as a prudent lawmaker. Thus, the ECtHR requires that laws interfering in legal proceedings are prepared in a scrupulous legislative process.[52] When validating an administrative act, e.g. to uphold local taxes against a potential series of proceedings taking into account the severe financial consequences, the lawmaker should rely on sound facts and figures which illustrate the risk and extent of these financial consequences. In *Joubert*, the ECtHR held that the mere fear that taxpayers would initiate a large number of legal proceedings was too hypothetical to justify retroactive validation.[53] In *Lecarpentier*, the ECtHR criticized the French government for not providing parliament with precise information concerning the potential costs of pending and future proceedings, which were said to endanger the banking sector and economic activities, in order to justify retroactive legislative intervention.[54] National courts tend to overlook these procedural requirements. The Belgian Constitutional Court readily accepts financial and political arguments invoked by the government even if they are not supported by evidence in the course of the law-making procedure.[55]

2.3.5. **Conclusion**

Although there is a clear distinction between interpretative acts and validation acts (see above 2.3.1.2. in fine), both categories correspond in many ways and raise similar constitutional questions, especially from the perspective of legal certainty, separation of powers and the right to a fair trial and access to an independent court (see above 2.3.2). The severity of the (constitutional) objections, however, differs from one legal system to another, depending on the concept and constitutional value of the principles at stake (see above 2.3.2.2.1-2.3).

Having a declaratory nature, both interpretative acts and validations acts are specific types of retroactive law, which are intended to cure deficiencies caused by a public authority. They do not in principle affect legitimate expectations (see above 2.3.2.2.4.).

Concerning interpretative acts, we mentioned, however, the importance of building in safeguards against possible abuse. If interpretative statutes do not really have an interpretative character or if established case law has already clarified an obscure original statute, the retroactive effect of the statute should be submitted to the same test as applied to ordinary retroactive laws. We also mentioned the fact that the legal uncertainty resulting from an obscure statute paradoxically weakens the judicial protection offered by the principle of legal certainty, because it does not enable the creation of legitimate expectations. It is therefore up to the legislator to enact clear and unequivocal laws from the start.

Concerning validation statutes, we stressed that in accepting those statutes as justified, the case law generally demonstrates a sound balance between general and individual interests (see above 2.3.3.2.). The financial rights of the Treasury should, however, not be a sufficient motive for the validation of an irregular administrative act. They need supplemen-

---

51. ECtHR, 23 October 1997, *National & Provincial Building Society v. UK.*
52. A. Jasiak, *Constitutional Constraints on Ad Hoc Legislation* (Nijmegen, Wolf Legal Publishers, 2010) at p. 242.
53. ECtHR, 23 July 2009, *Joubert v. France.*
54. ECtHR, 14 February 2006, *Lecarpentier v. France.*
55. See Const. Court (B), 26 November 2009, No. 186/2009 and W. Vandenbruwaene, case note, 'Retroactief ingrijpen na een ommekeer in de rechtspraak', *Rechtskundig Weekblad* (2009-2010) at p. 1430.

tary justification, such as the legitimacy of expectations as well as the good faith of both the authorities and the taxpayers. The legislator, when intervening in pending legal proceedings, should also act as a prudent lawmaker, following a scrupulous legislative process based on sound facts and figures which illustrate the risks and financial consequences were the act to not be validated.

2.4.
Legislation 'by' press release: the role of announcements in the debate about retroactive tax legislation

Johanna Hey

2.4.1. What is meant by the term 'legislation by press release'?

Legal restrictions on retroactive tax legislation are based on the rule of law[1] and the principle of legal certainty and predictability of the tax burden. From a normative perspective the tax burden is predictable if the underlying tax statutes are published in the official law gazette. However, this is only the last step in the law-making process. The change of the tax legislation starts to be visible during the first discussions and resolutions in cabinet or even earlier during a public debate about the need of a reform of the law. From that moment an alert taxpayer can sense that the law may change. Is it then 'fair' to insist that the new law may be applied only to transactions which take place after the law-making process is formally completed by the promulgation of the new law?

Enactment of tax increases from the date of their prior announcement is a very common practice of retroactive tax legislation. It is noted in all national reports. However, the concrete way in which 'legislation by press release' is carried out and the (scientific) appraisal of this practice differ significantly[2].

The question discussed below is whether announcements of forthcoming amendments are able to destroy the taxpayer's confidence in the prevailing legal situation, and whether the tax legislator is justified in going back to the date of the announcement the application of new tax laws.

Hence, the problem addressed by the term 'legislation by press release' is *not* a replacement of the formal legislative procedure. There is no doubt that the law needs to be promulgated in the required means of publication in order to come into force. However, if the tax legislator is allowed to apply a new tax statute from the date of its (first) announcement the announcement has the *effect* of replacing the existing law.

I will deal only with announcements in the case of an aggravation of the tax burden, excluding the practice of announcements of changes in favour of the taxpayer, as is used for example in France[3]. Announcements can be utilized in the implementation of new tax incentives to induce the intended behaviour even before the legislative procedure is concluded and the new law is promulgated. One might object to such a procedure in respect of the principle of equal treatment, because only a well-informed taxpayer is able to make use

1. See F. Vanistendael, in: V. Thuronyi, ed., *Tax Law Design and Drafting*, Vol. 1 (Washington: IMF, 1996), Chapter 2, at p. 25; and at length C. Sampford, *Retrospectivity and the Rule of Law* (Oxford: Oxford University Press, 2006).
2. See general report, section 3.1.
3. See national report of France, section 3.1.

of the incentive in advance of the legislative procedure. However, with regard to legal certainty and the protection of the taxpayer's confidence in the existing legal situation this category of 'legislation by press release' does not raise significant concerns[4].

2.4.2. Interdependency between the distinction between retroactivity and retrospectivity and the announcement

I will not deal with the concept and the distinction between retroactivity and retrospectivity and with the controversy between the 'tax-period related' and the 'taxable-event related' distinction between the two categories of retroactive legislation either[5]. This issue has to be discussed apart from the question whether an announcement can lessen the confidence of the taxpayer and gives the legislator legitimate reasons for making statutes retroactive to the date of their announcement.

However, there is an interdependency between the kind (intensity) of retroactivity and the question whether the tax legislator can lower the taxpayer's confidence by announcement. Announcements cause visible insecurity. If the line between retroactivity and retrospectivity is drawn mainly at the point whether the taxable event is already fully realized before the change takes place, it implies that in cases of retroactivity the taxpayer has no chance to react to the change of the law, whilst in cases of restrospectivity he might be able to at least partially adjust his behaviour.

For example, a taxpayer who only concluded a contract under the former law might be able to either insert right from the beginning a clause protecting himself from changes of the law or at least he can try to renegotiate the contract as soon as a change of the tax conditions is announced. In contrast, once the transaction is executed there is no longer any chance to deal with the insecurity and to react to an announcement.

Furthermore, the taxpayer might be tempted to secure advantages which are announced as going to be abolished just by signing contracts in the expectation that the tax legislator will issue a grandfathering rule for all contracts concluded and transactions started, but not finished, before a certain date. Often it will not be possible to carry out the whole transaction before the expected change. In this situation the legislator might be justified setting as cut-off date not the date of the promulgation but the date of an earlier announcement. This explains why announcement and grandfathering are closely related.

However, regarding both categories of retroactivity the concerns are based on the protection of the taxpayer's confidence. The only difference is that such confidence might deserve a higher protection from retroactive than from retrospective changes. Therefore, the relevance of the category of retroactivity for the assessment of the effect of announcements is only gradual but not categorical.

2.4.3. What is meant by 'press release'?

A change of the law can announce itself in many different ways. Early signs of a reform can be a change of a constant jurisprudence, a court demanding a reform[6] or a public debate on the need for a change in the law. However, from these signs it will be very difficult to judge, *if*, *when*, and *how* the law will change. More certainty is given by an official press release which can be published either by the parliament (the legislator itself) or by any

4. Similarly C. Sampford, *Retrospectivity and the Rule of Law* (Oxford: Oxford University Press, 2006) at p. 118.
5. See general report, section 1.2.
6. E.g. judgment of the Bundesfinanzhof (German Supreme Fiscal Court) of June 30, 2010, reference number II R 60/08, www.bundesfinanzhof.de, claiming the need of a reform of the German land tax which was held to be unconstitutional from years later than 2006.

other party involved in the law-making process, as, for example, the State Secretary of Finance in the Netherlands [7]. However, since not all legal systems know such an instrument of announcement by formal press releases, below I will look at the topic from a broader perspective and will deal with all kinds of announcements not only official press releases.

2.4.4. **Role of Publication**

The characteristic of retroactivity until the date of announcement is an enactment of the law prior to its publication, 'replacing' the publication as date of effectiveness by a date of announcement. Therefore it is necessary to deal with the role of the publication of laws.

Publication of laws is an indispensable element of legal systems governed by the rule of law. Legitimacy of the law and legal certainty can only be guaranteed if the law applied is published in a way accessible to everyone. Publication means the opposite of an arcane society where the citizen does not know in advance as to which event the state will threaten him.

Observing the – usually constitutionally provided – legislative procedure, including the promulgation as a final act, is also a question of the separation of powers[8]. An announcement of the tax authorities can never overrule the prevailing tax legislation enacted by the parliament. If an announcement of the tax authorities already has far-reaching legal consequences, the legislator is in the position of just confirming what the executive proposed without the option of deciding differently after the parliamentary debate[9].

Despite this normative concept of publication, one could argue that the taxpayer usually does not study the official law gazette, but gets his information about changes of the law from all kinds of other sources, namely from the press and media. It might be an overstated formalism to insist on the publication in the official law gazette.

Nevertheless, in my view there are quite a few important arguments why the promulgation in the relevant law gazette has to be the demarcation line for the protection against a worsening of the tax burden.

Insisting on the promulgation in the required way is not a mere formalism, because the official law gazette is the only reliable source for getting information about what the law at present asks of the citizen. No other source can claim the same reliability.

Moreover, every taxpayer has equal access to the official law gazette, whereas it is unclear in which way an announcement will be disseminated. There is no legal obligation to read a certain newspaper or to contact internet resources. Therefore, it is also a matter of equal treatment to refer only to the official law gazette. Otherwise there will always be some taxpayers who are better informed than others. The tax planning industry in particular is usually equipped with best contacts to the law-making institutions. They may be warned at an early stage of an upcoming abolishment of a tax incentive, which gives them the ability to adjust their strategies, whilst the 'normal' taxpayer will be caught off guard. This begs the question of whose capacity to take note is relevant. The German Constitutional Court pointed out that the taxpayer – at least in matters of substantial economic effect – normally would have recourse to professional advice anyhow, and that professionals also have to carefully follow upcoming legislative initiatives[10]. However, in my view one should take the

---

7. See general report, section 3.1 and national report of the Netherlands, section 2.2 and 3.1.
8. Sampford, *supra* note 1, *at* p. 158 and p. 160, furthermore see with regard to the importance of the separation of powers Vanistendael, *supra* note 1, Chapter 2, at p. 16.
9. Sampford, *supra* note 1, at p. 158 and at p. 161.
10. Judgment of the Federal Constitutional Court 7 July 2010, reference number 2 BvL 1/03, www.bverfg.de/entscheidungen/ls20100707_2bvl000103.html, at marginal no.74.

normal taxpayer's chances to get information into account. He is the addressee of the tax obligation, and there is no obligation for everyone to have a tax advisor.

Finally, until the promulgation the taxpayer has no guarantee that the change will actually take place in the way it is announced. Depending on the legislative procedure of the particular country, even at a late stage of the legislative proceedings the bill can fail to obtain the necessary consent. In case the change does not take place as announced the taxpayer is not protected, and he cannot claim damages. His confidence in the draft bill is not protected.

Consequently, from the constitutional role of the promulgation follows the *normative statement* that the taxpayer's expectations to be burdened only in accordance to the law and how it is published in the official law gazette, is *always* legitimate. Allowing the legislator to go back to a date before promulgation *without justification* would undermine the role of publication.

2.4.5. The need for justification of retroactive enforcement until announcement

Consequently, no matter what the quality of the specific announcement the tax legislator *always* needs a justification for making tax statutes retroactive to the date of their announcement.

In the balancing process of the justification one has to distinguish two aspects:
- the means and legal quality of the announcement and
- the reasons of the tax legislator for going back to the announcement date.

Both aspects are interdependent with each other. The more vague the announcement is the stronger the reasons needed by the tax legislator. On the other hand, if the taxpayer knows for sure not only *that* the law will change but also *how* it will change, the legislator might need less strong reasons for the retroactivity.

In some countries, it is getting to the point where the legislator does not need any further justification to go back to the date of announcement if the announcement meets certain requirements.

The Swedish constitutional statute 'Instrument of Government'[11] for example explicitly provides for a ban on retroactive tax legislation. At the same time it provides for an exception to this ban if either the government or a committee of the parliament submitted a proposal to the parliament, or even earlier, if the government sends a written communication to the parliament announcing the forthcoming introduction of such a proposal[12]. In this concept, application of a law from the date of the governmental communication is considered real/formal retroactivity, but *not* a *prohibited* one.

Similarly, the German Constitutional Court in its settled case law denies a need for a special justification for the period between adoption of a bill in parliament and promulgation[13]. The tax legislator therefore frequently makes amendments applicable from the date of their adoption in parliament. After adoption in parliament, one could argue that the democratic procedure has taken place. Nevertheless, the court's practice has been criticized[14], because in the field of taxation adoption in parliament is just an intermediate

11. Regeringsformen (1974:152).
12. See in detail the Swedish report, A.1a and B.8.
13. See e.g. Federal Constitutional Court Judgment of 14 May 1986, reference number 2 BvL 2/83, *BVerfGE* 72, at pp. 200.
14. J. Jekewitz, 'Der Zeitpunkt wirksamer Zerstörung des Vertrauensschutzes bei rückwirkenden Rechtsnormen', *Neue Juristische Wochenschrift* (NJW) 1990, at p. 3114ff, at p. 3118ff); F. Henseler, 'Vergütung von Vorsteuerbeträgen an nicht im Gemeinschaftsgebiet ansässige Unternehmer unter Berücksichtigung des Jahressteuergesetzes 1996', *Der Betrieb* (DB) 1996, p. 2152ff, at p.2153); J. Lang, 'Verfassungsrechtliche Zulässigkeit rückwirkender Steuergesetze', *Die Wirtschaftsprüfung* (Wpg.) 1998, at p. 163.

stage. For most tax laws the Federal Council has to agree; otherwise the new law fails. Thus, also after adoption in parliament it is not sufficiently clear whether and how the amendment will finally be enacted. Despite this criticism, in a recent decision the Constitutional Court has taken into consideration an even earlier date: From the moment of the tabling of a bill in parliament the taxpayer may not any longer count on the prevailing legal situation; he may not rely on the fact that the law will remain unchanged[15].

Yet, in my opinion, even if it does not need any other legislative act, the date of adoption in parliament cannot replace the official promulgation because it might be difficult or at least less easy to get to know the actual content of the adopted bill other than from the law gazette. In these cases as well an exception to the justification requirement cannot be accepted. The legislator may need less weighty reasons for the retroactive application. However, there is also no reason to give the legislator dispensation from the general rule that the earliest date of application of a new law is the date of promulgation. Otherwise the promulgation loses its guarantee function.

2.4.6. The weighting process

2.4.6.1. Quality of the announcement

a. Categorization by originator and content

The quality of the announcement can be categorized from the viewpoint of the separation of powers, taking into account the originator of the announcement, which can be a private institution (e.g. private media, scientific organizations), a member of the executive (e.g. the cabinet, ministry of finance, tax administration) or a legislative organ (parliament, Federal Council/Senate). From the viewpoint of the separation of powers an announcement by the parliament should rank higher than one from the executive. One could make an objection because in most countries due to the high technicality of tax statutes the parliamentary law-making process is greatly influenced by the tax administration, one could almost say they 'make' the law[16]. Therefore, the executive – unlike a private institution – is a reliable and competent source of information about upcoming changes in the tax law. However, from the viewpoint of the separation of powers it *does* make a difference whether a member of the executive or the legislator announces an envisaged change of the legislation.

Another way to categorize the announcement can be more content-wise, based on the criteria whether the change of the law *and* the retroactive effect is announced in a way that the economic operators are 'enabled to understand the consequences of the legislative amendment planned for the transactions they carry out'[17]. In *Stichting Goed Wonen II* the European Court of Justice emphasized that the announcement (in the case at hand a press release) needs to be clear, and that there were no substantial changes and amendments during the passage of the legislation. In this context one should be distinguish between announcements which only involve the envisaged change of the law, and announcements which also already announce the retroactive application of the new law.

Especially if the announcement is published at an early stage of the reform process, its content will normally be quite vague. It will just say *that* the law will change but not *what* the new law will look like, or at least will not render the exact content of the new law, or the

15. Judgment of the Federal Constitutional Court 7 July 2010, reference number 2 BvL 1/03, www.bverfg.de/entscheidungen/ls20100707_2bvl000103.html, at marginal no. 74.
16. See in detail to the interdependences in the legislative process between the legislative and the executive A. Dourado, General report, in: A. Dourado, ed., *EATLP International Tax Series. Separation of Powers in Tax Law,* Vol. 7, 2010, at pp. 29-37 and the national reports.
17. See ECJ, 26 April 2005, Case C-376/02 *Stichting Goed Wonen II*, [2005] ECR-I-03445 summary No. 2 and at p. 45.

exact date of its first application[18]. Vague announcements condemn the taxpayer to inactivity[19]. He can act neither on the grounds of the prevailing law, nor on the grounds of the new law. The law is not longer capable of guiding the taxpayer's behaviour. Published insecurity may not be confused with legal certainty as guaranteed by the rule of law. Only after the bill is drafted and the draft has been published will the taxpayer get a sufficient base to determine the tax consequences of his economic activities under the new law – as already mentioned, always with the risk that the proposed change might substantially change during the legislative procedure or even fail totally.

The national reports show that it is not possible to generalize at what stage of the legislative procedure announcements have the capability of weakening the taxpayer's confidence significantly or even destroying it, because it depends on the structure of the legislative procedure. Apparently in some countries there is an almost official procedure of announcement by press releases and communiqués of the tax authorities[20]. In other countries it is less clear which pre-legislative step will be regarded as having an announcement effect. Certainly, the adoption of the bill in parliament is an important step. However, its recognition depends on the specific parliamentarian system; it has less weight if the bill needs to be adopted not only in parliament but also in a second chamber (Federal Council/Senate).

But even beyond the differences in the constitutional legislative procedure, the political culture of tax legislation can also differ quite a bit from country to country[21]. There are apparently countries where bills drafted by the executive will normally pass the legislative procedure without significant amendments. In such a country, after publication of the final draft of the bill, the taxpayer knows not only that the law may change, but furthermore he also gets quite reliable information as to how the change will take place. If he carries out transactions according to the draft bill the risk that the change might not take place as proposed is reasonably low. In contrast, in a country like Germany with a two-house system, especially in situations of diverging political majorities between the two houses it is quite unclear how the draft bill will come out of the procedure. The more groups involved in the legislative process, the more likely it is that there might be major changes of the amendment during its passage through parliament.

It may also depend on the tax policy style of the governmental branch that is proposing the first draft of the bill, most often the ministry of finance. The ministry may come up right away with a reasonable and balanced proposal, which increases the chance that the draft will be accepted without major amendments. However, in a tense atmosphere between the ministry and the taxpayer the first draft may be unreasonably strict just to give the legislator a bargaining chip in the following discussions with all kinds of lobby groups.

b. Relevance of possible adjustments of behaviour to the changed legal circumstances

One important aspect in the approach of the German Constitutional Court towards retroactivity until the date of announcement is the idea of transferring the legal insecurity to the level of the parties to the transaction. In a recent decision on the abolishment of the favourable tax treatment for redundancy pay-outs the Constitutional Court suggests that from the moment the parties to the contract know about the risk of a change (in the decided case: the

18. Regarding the problem of a 'lack of precision' of the announcement see also Sampford, *supra* note 1, at p. 158.
19. Sampford, *supra* note 1, at p. 158 seems to have no problem with the fact that in these cases the taxpayer has to be cautious.
20. See national report of the Netherlands, section 3.1.
21. See the comparative analysis by Gordon/Thuronyi, *Tax Legislative Process*, in: V. Thuronyi, ed., *Tax Law Design and Drafting*, Vol. 1 (Washington: IMF, 1996), at pp. 1-14.

tabling of the draft bill in parliament) they should negotiate revision clauses[22]. The Court specified, that especially in long-term contracts, the parties should negotiate clauses to share the risk of future tax aggravations. However, the taxpayer will only negotiate such clauses if he is aware of the change, which again is linked to the quality of the announcement and the question whether it is disseminated in a way that a broad public is able to notice it.

c. Announcements in connection with a change in the case law

A special problem with announcements can be found in cases of a 'non-validation' law, if the tax legislator wants to react to a change of the case law by 'overruling' the court decision[23]. In this situation the tax authorities often announce right away that the new (advantageous) case law will not be applied in other cases and that the former (disadvantageous) case law will be (re-)enforced by a legislative act. The retroactivity in this situation is defended on the grounds that the taxpayer is not able to build up trust in the new legal situation created by the tax courts if parallel to or shortly after the publication of the new court decision the restoration of the status quo ante is announced[24].

The categorization of this kind of announcement is closely related to the concept and function of the judicial decision making: Is it creating new law or just interpreting what the law always was? In the latter case it cannot be argued, that the taxpayer cannot built up confidence by relying on the new court practice because actually he is not relying on the court practice but on the law as it it always was, and only now has been understood correctly by the courts. If one takes the opposite position, that the new court decision has law-creating effect and is changing the legal situation, one could argue that the announcement is only continuing the legal situation as it was before the change in the court practice. In this case there are indeed no grounds for confidence in the new advantageous rule if the restoration of the former practice is announced right away. However, also taking this view, it should be pointed out that the announced change has to exactly resemble the former case law, and may not contain any more burdensome beyond the former court practice.

2.4.6.2. **Reasons for the retroactivity**

Looking at the reasons of justification we have to distinguish between the legitimacy of the given reason of justification as such, its weightiness, and the question whether the retroactivity is suitable to meet the aims of the tax legislator. In the following I will deal only with reasons of justification connected to the fact that the change was announced which means that the taxpayer had the chance to adjust his behaviour to the forthcoming worsening of the tax burden.

The announcement as such cannot be equated with the justification of retroactivity[25]. Basically there is only one serious reason for enactment back to the date of announcement: That is the avoidance of announcement effects, whereas it is far from clear what is meant by an 'announcement effect'. Almost every change of the legal situation affects the taxpayer's behaviour, and any reaction to a proposed aggravation of the tax burden has an effect on the tax revenue. If the tax legislator manages to blind-side the taxpayer, he will

22. Judgment of the Federal Constitutional Court 7 July 2010, reference number 2 BvL 1/03, www.bverfg.de/entscheidungen/ls20100707_2bvl000103.html, at marginal no. 74.
23. See general report, section 1.7.
24. See judgment of the German Federal Constitutional Court (BVerfG) of 23 January 1990, reference number 1 BvL 4/87, *BVerfGE* 81, at p. 228 (239).
25. See above 5.

enjoy the full tax plus from the moment of enactment. Nevertheless, *mere* budget effects cannot be considered to be an announcement effect justifying retroactivity[26].

However, particular announcement effects might occur especially in fields of tax minimization:

– by making use of tax expenditures or
– by making use of loopholes of the law.

On the one hand, if an investment's economic success relies on a tax subsidy or the exploitation of a loophole the tax planning industry will aggressively try to safeguard its advantages before the new law comes into force. The announcement might induce a heavy rush for the tax incentive. Especially where tax avoidance is concerned the announcement can act like an 'invitation' to exploit the loophole as long as it is still possible. From the perspective of the fairness of the tax system it is difficult to accept that a group of taxpayers makes use of unjustified tax advantages and might even keep them for the future; nonetheless, the tax legislator changes the law.

Furthermore, announcement effects can result in economic distortions. The German Constitutional Court – in a judgment regarding the retroactive abolishment of shipbuilding subsidies[27] – considered the risk of overcapacities in the shipping area because of last-minute investments to be a sufficient reason for setting the cutoff date even earlier than at first announced[28]. The reasoning of the Court was not fully convincing because the German legislator knew for years about the overcapacities, but delayed starting the legislative procedure. It also was questionable whether denying the incentive to shipbuilding contracts concluded before the promulgation could really solve the overcapacity problem, at least not if they were carried out the way they were concluded. By including such contracts the tax legislator counted on the expectation that the parties would either renegotiate the already concluded shipbuilding contracts or would fail to fulfil them.

In the case of the retroactive closing of loopholes there are two different aspects of justification: One is that the confidence in a loophole might be considered not worthy of being protected. However, this argument does not necessarily corresponding to the announcement and would justify even a retroactive period further back than the announcement. The other aspect related to the announcement is that loopholes are often exploited by the contractual design of a transaction and that taxpayers who make use of the loophole react especially sensitively, one could even say aggressively, if their business models are jeopardized by a possible change of the tax law. Therefore, they might try to preserve their former tax advantages by last minute contracts on a grand scale.

On the other hand, the legislator is responsible for abolishing tax subsidies, avoiding loopholes, and closing existing loopholes as soon as possible. The longer it waits to start the legislative procedure the less plausible the need of retroactive legislation becomes. But even if he starts the legislative initiative right away, the procedure to bring the bill through the legislative organs can be quite time-consuming especially if the change is controversial. This may motivate the legislator to take a short cut by enacting the law with effect from the

---

26. See also judgment of the Federal Constitutional Court 7 July 2010, reference number 2 BvL 1/03, www.bverfg.de/entscheidungen/ls20100707_2bvl000103.html, marginal no. 82.
27. Judgment of the Federal Constitutional Court of 3 December 1997, reference number 2 BvR 882/97, *BVerfGE* 97, at pp. 67; see the detailed review of this decision J. Hey, 'Die rückwirkende Abschaffung der Sonderabschreibung auf Schiffsbeteiligungen', *Betriebs-Berater* (BB) 1998, at pp. 1444.
28. In the case at hand, the tax legislator really aimed to blind-side the taxpayer. The Cabinet decided to abolish the tax incentive for the shipping industry on 25 Apri 1996 and announced in a press release of the same day that this should apply for all contracts concluded after 30 April 1996. In the final bill the cut-off date was 25 April 1996. The Constitutional Court did not grant protection of the confidence in the announced cutoff date, because within these five days between the 25th and the 30th a real rush for ship building contracts took place.

beginning of the procedure[29]. However, if a tax change does not tolerate any delay, then the legislator has to accelerate the procedure within the constitutional boundaries. If it excessively delays the procedure the need for retroactive enactment from the announcement becomes less reasonable[30].

In my opinion, economic distortions, which can justify a retroactive enactment from the date of announcement, have to be seen apart from the lost tax revenue, which is due to last-minute transactions if the transaction as such has no immediate negative effect on the economy. For example, a looming increase in the inheritance tax usually gives rise to a flood of anticipated successions. As a result of such transfers the increase of revenue will be lower after the increase of the inheritance tax than without these transactions. However, I cannot see a distortive effect which would harm the national economy apart from the budget effects. If we do not clearly limit the justification to avoid announcement effects to distortions other than the loss of revenue, retroactive enactment from the date of announcement would become the rule instead of a rare exception.

29. Sampford, *supra* note 1, at p. 157.
30. Sampford, *supra* note 1, at p. 158 and at p. 161.

2.5.
The law and economics approaches to retroactive tax legislation

Charlotte Crane

2.5.1. Introduction

In an influential article published in 1977 Michael Graetz examined the arguments against the retroactive application of tax law revisions and found them wanting.[1] He rejected the traditional legal arguments that centred on whether "rights" had "vested" in such a way that "reliance" should not be frustrated. He instead used the then-relatively-new tools of law and economics to argue that a strict prohibition on retroactive tax changes not only served to limit desirable legislative action, but also inappropriately encouraged taxpayers to rely on the assumption that tax treatments would not change.

The "reliance" argument dominant in the traditional view was, in Graetz' formulation, circular. With a strong prohibition on retroactive taxation, even a taxpayer who knows that existing law contains undesirable features, and therefore who should know that change is likely, could position himself to take advantage of these features assured that he would not suffer should the legislature in fact act to change or remove them.[2] Graetz asserted that taxpayers themselves should be required to internalize the risk that the tax treatment might be changed. In Graetz' view, with no prohibition on retroactive changes to tax treatments, a taxpayer would discount the benefit he anticipated from the current tax treatment of any economic position to take into account the risk that the tax treatment will be changed. This discount would result in a lower cost to the taxpayer for the position at the time he commits to the position in the first place. Thus, in the example most often invoked, if the exemption from interest paid by municipal borrowers were understood to be susceptible to change even for interest paid on already issued bonds, a taxpayer would pay less for the bonds and might even be far less likely to buy them at any price. Indeed, a taxpayer ought to be expected to evaluate the desirability of any tax treatment, and, if a change is likely because the treatment is undesirable, his reluctance to commit will produce an societal benefit that approaches that of the anticipated change.

In making these arguments, Graetz was invoking an aspect of the method of law and economics that was then most often referred as an "ex ante" perspective, rather than the "ex post" perspective traditionally used by legal analysis. From this perspective, taxpayers

---

1. Michael J. Graetz, 'Legal Transitions: The Case of Retroactivity in Income Tax Revision' 126 *U. Pa. L. Rev.* 47 (1977).
2. This behaviour is labelled "moral hazard" in the law and economics literature more generally. It generally refers to the fact that a person is may expose himself to greater risk (for instance, by building a home on a flood plain) when he will not have to bear the costs involved should those risks be realized. Another frequently invoked market failure, adverse selection, can occur when those seeking protection from risk know that they are exposed to risks that others cannot easily see. In the case of tax changes, those who know that they are exposed to risk may seek to insure themselves from such risk by lobbying for an anti-retroactivity transition norm before the tax change is salient on the political agenda.

are expected to act not only with full knowledge of the law, but also with full knowledge of the fact that the law may change. At the beginning, ex ante, the taxpayer will pay less for the municipal bond because the interest might become taxable. Having paid less at the time he made took the position by buying the bond because the exemption might be removed, he hardly can complain when the exemption is removed. Graetz was also assuming a premise of law and economics that has since become known as "rational expectations," that is, that people know their own best interests and make their economic choices consistently with these interests.

From this ex ante perspective, the extent of the loss resulting from the change is almost irrelevant, so long as the loss is of the type that the taxpayer should have anticipated, and can be presumed to have been taken into account in the price he paid at the outset under the prevailing transition policy.[3] This same ex ante perspective allowed Graetz to demonstrate the arbitrariness of the lines that are most frequently drawn when prohibitions on retroactivity are implemented, since a nominally prospective change can result in far greater losses than many nominally retroactive changes do. Consider the buyer of a 20-year bond, the interest on which is exempt under the treatment in place at the time the bond is issued in year 1. Suppose the tax treatment is changed in year 4, so that interest paid beginning in year 5 and continuing through year 20 is subject to tax. Suppose, alternatively, that the tax treatment is changed in year 20, so that the interest for the last two years, which has already been received, is no longer exempt and an unexpected tax must be paid on this past income. Many approaches to tax law transitions would treat the first change as a permissible nominally prospective change, while the second change would be an impermissible nominally retroactive change. This distinction seems arbitrary, given that the first change would virtually always involve a far greater loss in the overall return actually realized by the buyer of the bond.[4] Finally, a limitation on a retroactive change (traditionally meaning limiting the change to bonds issued after the date of its enactment) could not be justified in terms of avoiding arbitrary losses, since such a transition date gives no relief to the other parties (including issuing municipalities) whose behaviour in the past depended upon the future availability of the exemptions).

One of the stronger claims made for this approach to tax transitions is that it can lead to results that enhance overall social welfare because the greatest possible effect is given to the tax change sought by the legislature. This improvement in overall social welfare can be far greater than – and is likely to outweigh – the harm resulting to the individual taxpayer in the form of a lowered return on previous commitments as a result of the tax law change. In this sense Graetz' approach, like that of virtually every other contribution to the debate in the academic literature in the United States is "welfarist." This approach implies not that the rights and interests of those disadvantaged are disregarded, but instead that the possible disadvantage to any particular individual will be taken into account in the overall assess-

3. This internalization of the anticipated tax change into price could be referred to as the "capitalization" of the anticipated taxes. Its effect on prices is essentially the same as the anticipation of taxes already in place that reduce the after-tax cash flows from an asset. See generally Charlotte Crane, 'Some Explicit Thinking about Implicit Taxes', 52 *SMU L. Rev.* 339 (1999).

4. Some implementations of a prohibition on retroactive tax changes might forbid the first change as well as the second; that is, they might allow the retroactive removal of the exemption to have an effect only on bonds issued after the date of the change. Legislative practice in the United States tends to use such an approach.
The point of the example holds if, for instance, the purchase of the bond is replaced with the purchase of an asset with an unlimited useful life of a type for which a special rate (like the capital gains preference in the United States) is changed, or with the acquisition of an education in anticipation of a lower rate on wage than investment income. Regardless where the line is drawn at which one concedes that there is no longer an impermissible degree of retroactivity, there will be a relatively high degree of arbitrariness involved in defending that line.

ment of the welfare of society as a whole.[5] Furthermore, under the appropriate assumptions, the disadvantaged individual is understood to have already anticipated the possibility of being disadvantaged at some time in the future. Therefore the disadvantaged taxpayer will have internalized this possibility at the earlier time when the commitment was made. No further adjustment for any disadvantage that is actually realized later as a result of the tax change is necessary.[6] As long as the possibility of this loss from a change in tax treatment was understood, there can be no claim that "vested rights" have been destroyed or that anything "unfair" has occurred.

Graetz was writing largely to demonstrate the futility of the traditional attempts to distinguish "vested rights" and "reliance interests" which could not be legitimately disturbed from other economic positions which could be disturbed.[7] But he was also writing in reaction to those who – using the same tools of ex ante perspective and assessment of effects on overall welfare – insisted that retroactive tax reforms would require compensation to those adversely affected.[8] The contribution Graetz made was not so much about the importance of taking an ex ante view of the effect of the possibility of retroactive tax changes, but about whether the effects of the mechanisms predicted by the ex ante view would be beneficial. These other, "old view," writers had started with the premise that any uncertainty produces economic inefficiency, and that this uncertainty resulting from the possibility of uncompensated tax changes would generate an unwillingness to make otherwise desirable investments. Graetz' "new view" argued that a reluctance to rely on current tax law was just as likely to have a beneficial effect as a deleterious effect, if it meant that taxpayers avoided making the investments the legislature was likely to later view with disfavour.

2.5.2. The cost of inducing desired behaviour in the presence of risk of change

In his initial exposition, Graetz was willing to accept that by introducing more uncertainty with respect to the tax consequences offered to induce desired taxpayer behaviour, the

---

5. This consequentialist move, from an ex post perspective focusing on notions of fairness to an ex ante perspective focusing on incentives, is not unique to the analysis of tax transitions, or even to the legal analysis of legal transitions. See Barbara Fried, 'Ex Ante/ Ex Post', 13 *J. Contemp. L. Issues* 123 (2003), for a discussion of similar moves in other disciplinary approaches to legal transitions.
6. The most common articulations of this mechanism in the tax transitions literature ignore the fact that the cost borne by the taxpayer upon the realization of the risk will only *on average* be equal to the benefit received upfront. Thus, only if each taxpayer is "fully diversified," will the costs to each of them of the internalization of the risk of change approximate the benefits. This suggests that the Graetz/Kaplow approach should not be used for those changes which inflict particularly large losses on discrete groups of taxpayers. Perhaps because the literature has focused on changes in the treatment of municipal bond interest – a relatively limited investment that may be made primarily by those with relatively large and diversified portfolios – the literature has not focused on this limitation of the Graetz/Kaplow approach.
7. Among the more prominent statements of the traditional view in the period immediately before Graetz' contribution were Tax Section of the New York State Bar Association, 'Retroactivity of Tax Legislation', 29 *Tax Law.* 21 (1975); Note, 'Setting Effective Dates for Tax Legislation: A Rule of Prospectivity', 84 *Harv. L. Rev.* 436, (1970); Alan S. Novick and Ralph I. Petersberger, 'Retroactivity in Federal Taxation', 37 *Taxes* 407 (1959).
   Other more nuanced defences of the traditional view regarding the need for compensation for legal change have emerged, see Frank I Michelman,. 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law', 80 *Harv. L. Rev.* 1165 (1967).
8. Martin Feldstein, 'On the Theory of Tax Reform', 6 *J. Pub. Econ.* 77 (1976). Among the premises of Feldstein was the lack of horizontal equity that would be involved with changing after-tax returns of only a particular set of prior commitments; this argument has little purchase if those holding those prior commitments understood the greater vulnerability of their positions. Feldstein relented a bit in 'Compensation in Tax Reform', 29 *Nat'l. Tax J.* 123 (1976).

anticipated rewards offered for such behaviour would have to be increased. In effect, the government would have to pay a premium relative to the price of inducing taxpayer behaviour when that price would be paid with certainty. But, Graetz argued, there is no reason to believe that the overall cost of this premium would be greater than the efficiency gains to be had from the earlier implementation of the reform.[9]

Much of the later literature has attempted to evaluate the cost (and the mechanisms that might reduce this cost in specific cases) to the legislature of leaving the risk of change with the affected taxpayers. Some writers predicted that the premium would be demanded in the form of relatively generous benefits that would be enjoyed "upfront." Taxpayers would insist, for instance, on inducements through refundable credits rather than through enhanced cost recovery that could be claimed over time, even when (assuming the provision remained in effect) the two would otherwise have identical present value, since in this case the legislature was less likely to remove the inducement before it could be fully enjoyed.[10] Obviously this amount of this premium will depend not only on the fact that the risk of change lies with the taxpayer (that is, that there will be no transitional relief), but also on perceptions about the likelihood that adverse changes will actually be enacted.

It may be useful to note that the issues involved in this debate are now more often framed in terms of whether "transitional relief" must be provided, rather than whether "a retroactive change" would be permitted. At the level of generality usually involved in discussions of transition policy, there is no difference between these two articulations. The later phrase could simply be restated as whether "an *uncompensated* retroactive change" should be permitted. The choice of transition policy can be seen as a choice about whether there should be "ex post" compensation for the loss resulting from the change. In a jurisdiction with a robust limitation on retroactivity, when a legislative change in fact creates a loss, an actual payment at the time the loss is realized would render the loss "compensated" and full "transitional relief" would have been provided.[11] In a jurisdiction with no such limitation on tax transitions, *the effective compensation for the loss occurs at the much earlier time when the position is first acquired*. The position will be available at a far lower cost than would be available were there no risk of future loss through legislative action. If the risk of legal change was properly anticipated, this reduction in cost will serve as the equivalent of a future compensating payment. (More on the likelihood that this risk can in reality be properly anticipated and internalized in the price of the initial position below.)

Viewing the issue as whether "transitional relief" is appropriate also finesses some of the difficulties involved in articulating just what is meant by "retroactive" or "retrospective" changes. As long as one can imagine identifying the person(s) entitled to "relief," one need not worry about precisely classifying degree of retroactivity that would otherwise be involved. And, somewhat more usefully in the real world of legislative change, degrees of retroactive effect can be adjusted by the nature of the transitional relief provided. Prior positions can be "grandfathered" by using effective dates (and dates of applicability) that

---

9. Graetz, *supra* note 1, at pp. 69-71. The inconsistency between the government's assertion of full sovereignty (here an assertion of the power to expropriate, mediated only by the political and institutional limitations involved in defining and collecting a tax) and its need to make credible commitments is sometimes referred to as the "sovereign's paradox" of the "sovereign's dilemma." E.g., David Haddock, 'Foreseeing Confiscation by the Sovereign: Lessons from the American West', in: Terry L. Anderson and Peter J. Hill, eds., *The Political Economy of the American West*, (Lanham, MD: Rowman & Littlefield, 1994), at pp. 129-145.

10. Daniel S. Goldberg, 'Government Precommitment to Tax Incentive Subsidies: The Impact of United States v. Winstar Corp. on Retroactive Tax Legislation', 14 *Am. J. of Tax Pol.* 1 (1997).

11. This description fits the situation in which the retroactive change amounts to what in the United States would be called a "taking." It may not, however, describe any real life situation. In a jurisdiction in which changes in tax treatments were similarly forbidden, rarely would a retroactive change in tax treatment actually be enacted and given effect such that a compensatory payment would actually be due.

result in minimal impact on the value of these commitments. For instance, suppose the exemption for bond interest is removed only for bonds issued after the effective date of the legislation. If this is seen as creating inappropriate losses, for instance, because many issuers had planned their financing expecting to be able to issue exempt bonds, the "grandfathering" can be extended by a postponed applicability date. If even this postponement is still viewed as creating undesirably harsh losses, perhaps because the issuer's entire existence depended upon the exemption, all (or some, or only one) issuer could be "grandfathered" and remain entitled to issue exempt bonds even after the legislative change.[12]

2.5.3. **Kaplow's generalized expansion on Graetz**

In 1986, Louis Kaplow generalized the Graetz approach to apply it to all government actions: Transitional relief for any sort of government action interferes with the ability of markets to properly assess and respond to risk and uncertainty brought about by the possibility of legal change.[13] The most efficient level of investment will occur when investors are required to take into account all of the risks and uncertainties, not when they are insured by the government against those risks through transition policies that either forbid retroactivity completely or require compensation. Kaplow's elaboration emphasized the inconsistency between the traditional cries to compensate transition losses without a willingness to mute transition gains, in support of the proposition that the older "reliance" view could not simply be about fairness. What is fair, Kaplow demanded, about a transition policy that ordinarily compensates transition losses, but systematically ignores the windfalls resulting from transition gains?[14]

2.5.4. **The equation of market risk with risk of legislative change**

Graetz had simply asserted that protection by law of those who invest in a product or process which is subsequently disdained in the marketplace is not required, nor even suggested by efficiency criteria. Why should efficiency demand a different result when losses

---

12. Eric Chason, in 'The Economic Ambiguity (and Possible Irrelevance) of Tax Transition Rules', 22 *Va. Tax L. Rev.* 615 (2003) rather cleverly extends this analysis to conclude that as an a priori matter, the stated transition policy may make no difference in the overall welfare gains associated with tax changes.
13. L. Kaplow, 'An Economic Analysis of Legal Transitions', 99 *Harv. L. Rev.* 509 (1986), at p. 552. Graetz himself had amplified his analysis in two intervening contributions, 'Implementing a Progressive Consumption Tax', 92 *Harv. L. Rev.* 1575 (1979) and 'The 1982 Minimum Tax Amendments as a First Step in the Transition to a 'Flat-Rate' Tax', 56 *S. Cal. L. Rev.* 527 (1983) (emphasizing the extent to which the minimum tax provisions put taxpayers on notice regarding the possibility of change). Much of the other debate regarding transition policy in the intervening years considered whether the transition issues associated with moving from an income to a consumption tax (and therefore subjecting consumption from after-tax savings to tax, when such consumption would have been exempt from additional income tax) were qualitatively different than changes in tax treatments of various income streams under an income tax. An important U.S. Treasury Department study of tax reform options had assumed that they were, *Blueprints for Basic Tax Reform*, (1977), at p. 181. For a later more explicit account of this issue, see Louis Kaplow, 'Recovery of Pre-Enactment Basis under a Consumption Tax: The USA Tax', 68 *Tax Notes* 1109 (1995). Included in this branch of the debate were issues regarding the perspectives from which transition gains and losses should be measured and the relevance of various indirect effects. Howard Abrams, 'Rethinking Tax Transitions: A Reply to Dr. Shachar', 98 *Harv. L. Rev.* 1809 (1985); Michael J. Graetz, 'Retroactivity Revisited', 98 *Harv. L. Rev.* 1820 (1985); Avishai Shachar, 'The Importance of Considering Liabilities in Tax Transitions', 98 *Harv. L. Rev.* 1842 (1985).
14. Saul Levmore, in 'Changes, Anticipations, and Reparations', 99 *Colum. L.Rev.* 1657, 1662 (1999), suggested that various ordinary features of a legal system actually do the work of denying winners gains when they truly would be "windfalls." In ordinary tort litigation, for instance, a plaintiff who persists in seeking legal reform is likely to be rewarded by his damages, but only named plaintiffs, or only those who have acted before a statute of limitations can run, will realize the full extent of the transition gain involved.

occur because a change in tastes or societal conditions is reflected through the political process, rather than in the market? [15]

Kaplow examined this premise with considerable care, but in the end simply put the burden of demonstrating the difference on his critics.[16] Thus, the equation of the risk of government action with market risks generally may be the most intuitively vulnerable step in the Kaplow explication of transition policy. On the one hand, the theory relies on providing incentives for anticipating and internalizing risk by placing the cost on those who fail to anticipate such risks. But, in general, such costs are properly imposed only on those parties who have better information, that is, parties who are well situated to identify those risks and act in anticipation of them. Taxpayers may have an advantage in their ability to identify their exposure, but it is not at all clear that they are well situated to act in anticipation of them, or that they are better suited than the legislature to anticipate the actions of the legislature. Under what circumstances do taxpayers actually have better information about tax changes and actually place bets based on that better information? Perhaps when they have very industry-specific information about an incentive provision that is being abused, but that is probably not the ordinary case.

2.5.5. The 'heroic' assumption of desirable legislative change

As noted above, Graetz' original contribution appeared at a time when prohibitions on retroactivity seemed likely to threaten what he viewed as desirable tax reform.[17] Graetz was clearly frustrated by those who, although ostensibly favouring reform, acknowledged that expectations based on bad prior law should be honoured even if these expectations presented obstacles to reform. Although he did expect that observers would take into account the need for a change when assessing the likelihood of a change, he did not explicitly rely on an assumption that tax changes would always be for the good. His critics have nevertheless suggested that his approach fails entirely without this assumption. Although his reasons for promoting a greater tolerance for retroactive tax changes relied on this assumption, the mechanism he described does not.

How should the possibility of undesirable[18] tax changes affect transition policy analysis? One answer might be simply that, although there is a good possibility that any isolated change may be undesirable, over time the general trend should be toward improvement, simply because over time there is more information available in the political process, which should result in evolution toward more efficient solutions of social problems, even if in those solutions present themselves in fits and starts. [19]

---

15. Graetz, *supra* note 1, at p. 65.
16. For a careful analysis of the possibly relevant differences between market changes and legal changes, see David Hasen,'Legal Transitions and the Problem of Reliance', 2 *Colum. J. of Tax Law* (2010). To summarize somewhat crudely, Hasen points out that market changes, unlike legal rules, have no temporal content; they have effect when they occur and need not be "applied" or "given effect" in the sense legal changes must. Hasen goes on to suggest that the Graetz/Kaplow approach must fail because it relies on the existence of market mechanisms which in turn rely on the approach to legal change that they reject.
17. The catalyst both for the reforms Graetz sought to defend and for the possible approaches to transition may well have been David Bradford and Staff, U.S. Treas. Dept., Blueprints for Tax Reform (1977). Chapter 6 includes a discussion of the possible transition to both a truly comprehensive income tax and to a cash-flow consumption tax.
18. The description of the impact of legislative change has varied in the literature, depending both on the position ultimately taken and the extent to which the focus has been on the trend in legislation instead of on particular pieces of legislation.
19. The origins of the designation as "heroic" for the assumption that "new law is more often good than bad law may lie with Saul Levmore, note 11 above.

A more complete answer requires analysis of the political process more generally, an analysis that Kaplow began but arguably did not finish. As Kaplow made clear, the risk of legal change may be no different from the risk of any other change in the economic environment in which commitments are made. Therefore, it is possible that something like a market mechanism for internalizing the risk of legal change is superior to what is effectively government insurance against legal change, regardless of the "direction" of that change. The taxpayer should be required to take into account the possibility of legal change when first making commitments, and that the government should not be required to indemnify all losses resulting from legal change. So long as legislative legal change will at least be no worse than random in its effect, mechanisms that place the burden of the risk of legal change on those affected, and not on the government itself, may be superior than the market interference that government insurance against legal change would involve. Thus, regardless of whether one can make any assumptions at all about whether legislative change is likely to be "desirable," retroactive legal change must be permitted in order to allow the market mechanism for internalizing risk of legal change to operate.

In sum, a presumption of desirable change may not be necessary to the technical arguments about why an ex ante approach to legal change could be *at least no worse* than to the traditional reliance approach. But some of the possible consequences of such an approach are indeed perverse without such a presumption. To put it simply, to the extent that possible undesirable changes can be retroactive, if the internalization-of-risk mechanism works as claimed, that undesirable change will be amplified and accelerated as a result of the possibly retroactive rule, just as a desirable change would have been. The legislature need not actually impose the tax in order to achieve much of its intended result, a result which will be enhanced by the possibility of retroactivity, regardless of whether that result is overall welfare-enhancing. For some, the compounded undesirability of the results of relaxing the "desirable change" assumption suggests that the incentive-based approach of Graetz and Kaplow is at best incomplete.[20]

2.5.6. The incentives of the legislature and the possibility of opportunistic behaviour

What about the fact that, without a retroactivity constraint, the government itself is free to behave opportunistically? Graetz seemed to have been willing to assume that legislative change would be desirable. Kaplow acknowledged the possibility that this might not be true, but seemed willing to conclude that legal change will at least be neutral in terms of enhancing social welfare – a government that did otherwise would not endure for long. Others contributing to the debate have found it difficult to be even this optimistic about the legislative process, and have suggested that the behaviour of the legislature would change in undesirable ways if there were no prohibition on retroactive changes. The analytical tools of the political economy wing of law and economics (sometimes called "public choice") include the premise that members of legislatures are more likely to act in their own self-interest than they are to act in an effort to further the public good.[21] Under this premise, an unconstrained legislature might extort from those with substantial precommitments by

20. Kyle D. Logue, 'Legal Transitions, Rational Expectations, and Legal Process: Is There an Ideal Way to Deal with the Non-Ideal World of Legal Change', 13 *J. Contemp. L. Issues* 211 (2003).
21. Richard Doernberg & Fred McChesney, 'Doing Good or Doing Well?: Congress and the Tax Reform Act of 1986', 62 *N.Y.U. L. Rev.* 891 (1987); Richard Doernberg & Fred McChesney, 'On the Accelerating Rate and Decreasing Durability of Tax Reform', 71 *Minn. L. Rev.* 913 (1987).

threatening to use its power to retroactively tax.[22] And those with substantial precommitments that could be vulnerable to such retroactive taxes would find it in their interest to devote substantial resources, in lobbying efforts if not in more direct payments to legislators, to avoid this result.[23] These efforts would, in turn, produce transitional relief that could only be described as contorted and perhaps even corrupt.[24] The possibility of such results have led some – even though for the most part accepting the descriptions of the Graetz/Kaplow analysis of the dynamics involved in tax changes – to call for mechanisms whereby a legislature can commit to not enacting legislation with strong retroactive effect.[25]

2.5.7. **One size fits all?**

Many of the contributions to this literature in the United States seem to have implicitly accepted the idea that there can be only one "transition policy" for tax changes. In his 2000 book, *When Rules Change*,[26] Daniel Shaviro attempted to outline a middle path, a transition policy that was less monolithic and more nuanced. He attempted to account for the intuitively negative response that usually accompanies legal changes that are substantially retroactive, and conceded that a prohibition on nominal retroactivity can sometimes serve as a useful limitation on legislative power.

Shaviro more systematically took into account the predictable failings of the legislative process, neither brushing them aside as irrelevant nor using them as an excuse to return to an old-view set of arbitrary rules-of thumb. He nevertheless endorsed the Graetz/Kaplow approach for an identifiable subset of legislative changes. Those changes for which no transitional relief should be allowed include any change that moved the income tax closer to a

---

22. J Mark Ramseyer & Minoru Nakazato, 'Tax Transitions and the Protection Racket: A Reply to Professors Graetz and Kaplow', 75 *Va. L. Rev.* 1155 (1989).
23. Franklin A. Green, 'The Folly of Long-Term Tax Planning: Comments on the Instability of the Tax Law', 74 *Tax Notes*, 481 (1997); Eric Chason, 'The Economic Ambiguity (and Possible Irrelevance) of Tax Transition Rules', 22 *Va. Tax. Rev.* 615 (2002)(urging an analysis that treats all benefits and costs as mere cash flows, but includes possibility that moves from bad tax policy may actually be more likely if transition relief is promised, since those enjoying benefit have nothing to gain from opposing the change, and may even be more willing to reveal the true situation)
24. For instance, "rifleshots" grandfather only a very limited – perhaps even clearly identifiable single taxpayer – and their existence tends to support the idea that the threat of retroactivity will not only intensify lobbying against reform, but produce such incomplete reforms that there is no reason to believe that, even if the reform were clearly desirable, the "second best" incomplete reform is. See generally Lawrence Zelenak, 'Are Rifle Shot Transition Rules and Other Ad Hoc Tax Legislation Constitutional?', 44 *Tax L. Rev.* 563 (1989).
Heather Field, in 'Taxpayer Choice in Legal Transitions', 29 *Va.Tax Rev.* 505 (2009) explores the less common situation in which the taxpayer is given a choice about whether to apply old law or new law; in some past examples this choice has been available only to a limited group of taxpayers and has operated very similarly to an ordinary "grandfathering rule," in other situations, the choice is not tied to the same type of criteria (for instance, contracts already binding or payouts that have already begun) usually involved in grandfathering. The suggestion is that such devices may allow the legislative process to diffuse the energy of those most politically powerful who would be losers without transitional relief. It stops short, however, of providing a justification for assuring that transition gains are as great as possible.
25. E.g., Kyle Logue, 'Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment', 94 *Mich. L. Rev.* 1129 (1995-1996), suggesting that certain changes introduced to induce particular behaviours should be handled as contracts, rather than as ordinary legislation.
26. D.N. Shaviro, *When Rules Change: An Economic and Political Analysis of Transition Relief and Retroactivity* (Chicago: University of Chicago Press, 2000). Shaviro's principle points can be gleaned from a critical review, Kyle D. Logue, 'If Taxpayers Can't Be Fooled, Maybe Congress Can: A Public Choice Perspective on the Tax Transition Debate', 67 *U.Chi. L. Rev.* 1507 (2000).

comprehensive tax base.[27] Thus Shaviro's elaboration of a tax transition policy relies on an independent criterion for determining when a tax change is "good," and would allow retroactive changes when those criteria are met. Echoing the environment in which Graetz made his original argument, Shaviro distinguishes those changes that move toward a more comprehensive tax base (which should be allowed extensive retroactive effect) from those that do not (for which far less uncompensated retroactivity should be allowed). (Although this stipulation admittedly clears out some ground, ambiguities about what moving to a comprehensive tax base might actually mean creates its own limits. For instance, imagine a change to the tax treatment of tax lawyers that imposed a surtax on their prior earnings, justified by the asserted need to retroactively capture the imputed value of the psychic income tax lawyers clearly enjoy.)

Shaviro acknowledges that there are some changes that simply should not be allowed retroactive effect because there is no possibility that the substantive reasons for the change would be furthered by their retroactive application. These "accounting changes" should be distinguished from "substantive policy changes,"[28] which, hopefully for the better, are enhanced by at least a limited degree of retroactivity.

2.5.8. **Conclusion**

It should be pointed out that the Graetz/Kaplow view was probably only possible given the constitutional environment in which the US Congress had been operating for most of the twentieth century. Although the Supreme Court had early in the century clearly signalled that some types of retroactivity (in particular, the introduction of an entirely new tax on discretionary activities completed in the past) would not be permitted, it also had signalled that it was unlikely to second-guess Congress in situations in which the problems Congress created involved only mild forms of retroactivity and did not contain other more nefarious legislative motives. Thus the task accomplished by Graetz and Kaplow was not so much to totally replace a clearly articulated and rigorously enforced prior norm, but instead to describe the space in which the actual outcomes of the political process in the United States seemed to operate, to legitimate that space, and to modestly increase it.[29]

What remains unexplained is why, despite the acceptance of the expectations approach in the academic literature, there is still such limited retroactivity by the United States Congress. The answer may provide proof that the mechanisms describe by Graetz and Kaplow are in fact at work, but operate to limit, not expand retroactivity. While the losses on

---

27. The phrase "comprehensive tax base" is a term of art in tax policy debates in the United States. See, e.g., Stanley Surrey, *Pathways to Tax Reform* (Harvard: University Press, 1973); Boris Bittker, 'A "Comprehensive Tax Base" as a Goal of Income Tax Reform', 80 *Harv. L. Rev.* 925 (1967). One need not agree with every aspect of this debate in order to find Shaviro's classification here useful. He, like Graetz twenty-five years earlier, meant to invoke the notion of base-broadening and loophole closing changes. Such changes can be assumed to be welfare-enhancing, since they remove the misallocation of resources that inevitably accompanies special tax treatments. As Shaviro openly acknowledges, the notion of "comprehensive" invoked here applies equally to a broad-based consumption tax as to the income tax, *supra* note 26, at pp. 93-98.
28. Neither Shaviro nor Kaplow and the Treasury Department Bluebook (in which the origins of this distinction can be found in the latter's treatment of taxable period changes and the base change from income to consumption) provide more than an essentially tautological description of the distinction made here: accounting method changes (including timing and nominal incidence) are defined as those changes that it makes little sense to apply retroactively. The contribution Shaviro makes here, therefore is identifying more situations in(including chances in incidence) in which retroactivity is undesirable.
29. For a description of this practice from a more traditional legal point of view, see generally Charlotte Crane, 'Constitutional Limits on the Power to Impose a Retroactive Tax', in: *Blessings of Liberty: The Constitution and the Practice of Law* (Philadelphia: ALI-ABA, 1988).

nominally retroactive laws may be no larger than the losses experienced as a result of nominally prospective laws, there is a far greater likelihood that those who will be harmed by the latter can be identified. And, even if the legislature did not intend to single these losers out (as it clearly would with acts that would violate the existing anti-reactivity provisions in the United States Constitution), these potential losers are likely to be able to organize and protect themselves against much of the threatened loss. In short, although tax transition policy may affect the bargaining positions available in the political process, it may not affect the overall amount of retroactivity, at least in the absence of absolute enforcement of relatively arbitrary prohibitions that can be imposed by processes outside the legislative process.[30]

2.5.9. Postscript: optimal tax theory: the other law and economics-derived argument for retroactive taxes

The Graetz-Kaplow arguments endorse the denial of transitional relief for changes in the tax treatments of existing economic positions. There is another argument that invokes similar analytical tools to positively endorse uncompensated retroactive taxes, but only when those taxes can truly be "bolts from the blue." Under this argument, potential taxpayers, oblivious to the possibility of taxes that might be imposed in the future, commit to positions in the market that, by definition, are efficient in the sense that they maximize the welfare of those participating. Subsequent to this productive activity, an unanticipated retroactive tax effectively expropriates some of the wealth generated, but, if it is in fact unanticipated, it will not interfere with the resource allocations previously determined by the market activity. [31] The "dead-weight" cost of taxes (that is, the loss of utility associated with the price change triggered by a tax anticipated at the time of the market transaction) is eliminated. The force of this argument, of course, depends upon the extent to which the government can make a credible commitment that this bolt-from-the-blue is in fact a one-time occurrence. The possibility of such a commitment depends in large part upon the nature of the transition: a clear one-time shift to a totally new tax base with retroactive effect would clearly be perceived differently from a shift that denied a rather routine type of preferential treatment.

2.5.10. Annex – Bibliography

Charlotte Crane, "Constitutional Limits on the Power to Impose a Retroactive Tax," in *Blessings of Liberty: The Constitution and the Practice of Law* (ALI-ABA 1988).

Eric Chason, "The Economic Ambiguity (and Possible Irrelevance) of Tax Transition Rules," 22 *Va. Tax L. Rev.* 615 (2003).

Michael Doran, "Legislative Compromise and Tax Transition Policy, "74 U. Chi. L. Rev.545, (2007).

Martin Feldstein, "On the Theory of Tax Reform," 6 *J. Pub. Econ*. 77 (1976).

30. For an elaboration on the role of a flexible policy regarding retroactivity in the legislative process, see Michael Doran, 'Legislative Compromise and Tax Transition Policy', 74 *U. Chi. L. Rev.*545, (2007).

31. The most commonly cited analysis is that of James Mirrlees, 'An Exploration in the Theory of Optimum Income Taxation', 38 *Rev. Econ. Studies* 175 (1971). Saul Levmore, 'The Case for Retroactive Taxation', 22 *J. Legal Studies* 265 (1993) explores variations of the general proposition. He includes the interesting observation that there may be little taxation with retroactive effect enacted at the national level, where losses would tend to be big enough that coalitions of those who can see that they be affected will form to oppose them, while those adversely affected by prospective taxes don't, literally, know what is about to hit them. (Although Levmore does not make this claim, these coalitions may the strongest articulators of anti-retroactivity norms.) He further observes that taxes with strong retroactive effect (that is, property taxes) are very common at the local level, where, despite the ability of potential losers to react, normal political processes – and the congruence of those affected by such taxes and their more prospective alternatives – will lead to less resistance from these losers.

Martin Feldstein, "Compensation in Tax Reform," 29 *Nat'l. Tax J.* 123 (1976).
Barbara Fried, "Ex Ante/ Ex Post," 13 *J. Contemp. L. Issues* 123 (2003).
Daniel S. Goldberg, "Government Precommitment to Tax Incentive Subsidies: The Impact of United States v. Winstar Corp. on Retroactive Tax Legislation, "14 *Am. J. of Tax Pol.* 1, (1997).
Michael J. Graetz, Legal Transitions: The Case of Retroactivity in Income Tax Revision, 126 *U. Pa. L. Rev.* 47 (1977).
Michael J. Graetz, "Implementing a Progressive Consumption Tax," 92 *Harv. L. Rev.* 1575 (1979).
Michael J. Graetz, "Retroactivity Revisited," 98 *Harv. L. Rev.* 1820 (1985).
Franklin A. Green, "The Folly of Long-Term Tax Planning: Comments on the Instability of the Tax Law," 74 *Tax Note*, 481 (1997).
David Hasen, "Legal Transitions and the Problem of Reliance," 2 *Colum. J. of Tax Law* (2010).
Louis Kaplow, Transition Policy: A Conceptual Framework, 13 *J. of Cont. Legal Issues*, (2003-2004).
Saul Levmore, "Changes, Anticipations, and Reparations," 99 *Colum. L.Rev.* 1657 (1999).
Saul Levmore, "Retroactive Taxation," 3 *New Palgrave Dictionary of Economics and the Law* (MacMillan 1998) p.340.
Saul Levmore, "The Case for Retroactive Taxation," 22 *J. Legal Studies* 265 (1993).
Kyle Logue, "Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment", 94 *Mich. L. Rev*. 1129 (1995-1996).
Kyle D. Logue, "Legal Transitions, Rational Expectations, and Legal process: Is There an Ideal Way to Deal with the Non-Ideal World of Legal Change," 13 *J. Contemp. L. Issues* 211, (2003).
Kyle D. Logue, "If Taxpayers Can't Be Fooled, Maybe Congress Can: A Public Choice Perspective on the Tax Trausition Debate," 67 U.Chi. L. Rev. 1507 (2000).
Alan S. Novick and Ralph I. Petersberger, "Retroactivity in Federal Taxation," 37 *Taxes* 407 (1959).
J Mark Ramseyer & Minoru Nakazato, "Tax Transitions and the Protection Racket: A Reply to Professors Graetz and Kaplow," 75 *Va. L. Rev*. 1155 (1989).
Avishai Shachar, "The Importance of Considering Liabilities in Tax Transitions," 98 *Harv. L. Rev*. 1842 (1985).
Daniel Shaviro, When Rules Change: An Economic and Political Analysis of Transition Relief and Retroactivity (U Chicago 2000).
Daniel Shaviro, When Rules Change Revisited, 13 Journal of Contemporary Legal Issues, (2003-2004).
Tax Section of the New York State Bar Association, "Retroactivity of Tax Legislation," 29 *Tax Law.* 21 (1975).
U.S. Treasury Department, *Blueprints for Basic Tax Reform* (David Bradford, ed. 1977).
Note, "Setting Effective Dates for Tax Legislation: A Rule of Prospectivity," 84 *Harv. L. Rev.* 436, (1970).

2.6.
It's the outcomes, not the rules: transition issues in the process of tax reform

Henk Vording, Koos Boer and Allard Lubbers

2.6.1. Introduction

The standard case in the tax transitions literature is the abolishment of an income tax exemption for interest on government bonds.[1] Apart from focusing on a single-rule change, this case is also fairly simple in its effects – or at least, the literature tends to deal with the simple effects only.[2] As a consequence, the nature and size of transition losses seem almost self-evident. In this stylized setting, the academic debate can focus on questions such as: are the holders of these bonds entitled to rely on exemption, or should they reckon with legal change as a normal risk of life? Should a fixed rule be used (and be made known to taxpayers) for all comparable cases of tax transitions?

In this contribution, it is argued that the process of identifying losses due to legal change is political in nature. Instead of looking at changes in rules, the focus should be – and usually *is* – on outcomes. Politics generates a continuous flow of legal changes which affect people's lives. What matters is not whether taxpayers should be able to rely upon rules, but whether the outcomes of changes in rules reflect political judgments.

An obvious illustration is the case of major tax reform.[3] Tax reforms often assume a specific pattern: deductions and exemptions are reduced, and the additional revenue is used to reduce the tax rates as well.[4] The outcome will often be that the average taxpayer suffers no overall loss, while many of the remaining losses (and gains) reflect political purposes (e.g., improving economic incentives). But the point raised here is broader. It is a political decision how to frame the effects of legal change in terms of gains and losses; whether or not to connect separate legal changes into a package; how to balance short-run

---

1. The characterization is from Michael Doran, 'Legislative Compromise and Tax Transition Policy', *University of Chicago Law Review* 2007, pp. 545-600, at p. 548; see Michael J. Graetz, 'Legal Transitions: the Case of Retroactivity in Income Tax Revision', *University of Pennsylvania Law Review* (126) 1977, pp. 47-87, at p. 57-58; Louis Kaplow, 'An Economic Analysis of Legal Transitions', *Harvard Law Review* (99) 1986, pp. 509-617, at p. 516. Doran offers a good recent overview of the literature, as does Daniel Shaviro, *When Rules Change: an Economic and Political Analysis of Transition Relief and Retroactivity* (Chicago: Chicago University Press, 2000); see also the contribution by Crane in this volume.
2. The literature deals mainly with taxpayer losses; the second-order effect in related investment markets is usually ignored, though the seminal article by Graetz, *supra* note 1, at p. 57, discusses it. See also Doran, *supra* note 1, at p. 549, for further discussion.
3. The word 'tax reform' is used here in a descriptive sense to refer to changes in tax rules which are presented as coherent in the political process.
4. Although there are large differences in tax policies between OECD countries, almost all the reforms of personal income tax in the last two decades can be characterized as rate reducing and base broadening. OECD Tax Policy Studies No. 13: *Fundamental Reform of Personal Income Tax*, Paris, 2006.

losses against long-term gains. Transitional rules are just one type of instrument in the political wheeling and dealing needed to achieve legal change. Their relevance may be limited to those situations where the legislative process is unable to develop sufficient explanation for large individual losses.

In fact, the literature on tax transition relief has been moving from the paradigmatic simple case into wider perspectives. One clear illustration is the debate on a shift from income taxation to a personal consumption tax. The US discussion on this issue is extensive,[5] focusing on an overall change from income taxation to alternative models of consumption tax – yet to be adopted (in Europe, there is no comparable debate, as the focus is on a gradual shift from income taxes to the existing VAT). The US literature has tended to stick to the 'single rule change' approach. If the issue were one of substituting a pure consumption tax for a pure income tax, the single rule change would be a radically different tax treatment of savings.[6] In that case, techniques can be designed for offering relief. But in fact, existing income taxes treat savings inconsistently, as would a politically feasible consumption tax probably do. With that in mind, thinking on transitional relief has become more pragmatic. One more step would bring us to the conclusion that the very conceptualization of transition issues is largely a political process.

Section 2.6.2 discusses the transition problems in the shift from a pure system of income taxation to an equally pure consumption tax. It is shown that the transition problem depends on the type of consumption tax chosen. In section 2.6.3, hybridity enters the stage: the point of departure is not a pure income tax, nor will the point of arrival be a pure consumption tax. Transition issues consequentially become much more complicated. In section 2.6.4, the question is raised how the 'tax reform' setting can be distinguished from the paradigmatic 'single rule change' case. It is argued that the distinction is very much a matter of political construction.

2.6.2. A shift from a pure income tax to a pure consumption tax

2.6.2.1. The models of income tax and consumption tax

Income tax is a direct tax: an individual's yearly income is assessed and taxed. Consumption tax is usually an indirect tax: goods and services are (effectively) being taxed at the retail stage.[7] A direct consumption tax would assess an individual's yearly income and allow a general deduction for either savings and investments or the return to savings and investments. The idea can be explained using table 2-2.

5. A good (and critical) overview is John K. McNulty, 'Flat Tax, Consumption Tax, Consumption-Type Income Tax Proposals in the United States: A Tax Policy Discussion of Fundamental Tax Reform', *California Law Review* (88) 2000, pp. 2095-2185; for a fundamental critique of the discussion: Liam Murphy and Thomas Nagel, *The Myth of Ownership, Taxes and Justice* (Oxford: Oxford University Press, 2002), Chapter 5 (the Tax Base).
6. In line with the literature, the concept of 'savings' is used throughout this contribution in a wide sense, including investments, assets, etc. In other words, it refers to all spending power not used for current consumption.
7. The VAT works out as a retail sales tax because for (almost) all business-to-business transactions, VAT is deductible.

Table 2-2. Alternative personal tax systems: tax treatment of savings and consumption

	income tax (1)	*consumption tax*	
		(2) return exempt	*(3) savings exempt*
period 1:			
savings	T	T	U
return	T	U	U
period 2:			
consumption	U	U	T

T = taxed; U = untaxed

Under the 'model' personal income tax (column 1), the investor saves out of his net income (hence the T on savings), and includes his portfolio income in his taxable income. The net result can be consumed in period 2, without further income tax consequences.

Under a 'model' personal consumption tax, there are two options. One is to tax income but exempt the return to savings and investments (column 2); savings will still be made out of after-tax income, and future consumption remains untaxed. The second option is to tax income but exempt savings (column 3). In that case, the investor postpones paying tax (over the consumption of his accrued savings) to period 2.

Under the exemption for return approach (column 2), the tax comes immediately; under the exemption for savings approach (column 3), it is postponed. The equivalence between these different consumption tax approaches relies on a net present value argument. If the value of tax postponement (under the exemption for savings approach) is captured by the return to savings, investors will be indifferent between these two models for personal consumption taxation. This will indeed be the case if the investor's discount rate equals the before-tax rate of return on his savings and investments. The gist of a consumption tax (of either type) is that the reward for postponing consumption (the discount rate) is not taxed, as it is under an income tax.[8]

Finally, an *in rem* consumption tax, such as a VAT, equals a personal income tax with savings exemption.[9] The most important difference is that a personal consumption tax may have progressive rates, while a VAT cannot take account of the consumer's overall spending.

Table 2-3 illustrates the effects of a shift to consumption tax in the long run. For simplicity of presentation, the type of consumption tax illustrated here is the one that exempts savings from the income tax base. The positions compared are those of a low-paid worker who does not save, and a high-paid worker who does. Their lifetime is, for simplicity, assumed to exist of two periods. In the first period, the high-paid worker saves and receives a return on these savings; in the second period, he consumes his accrued savings, including the return.

8. However, a consumption tax of the return exemption type will also exempt any return in excess of the discount rate. A solution would be to include these rents in the tax base. This is, in fact, what the VAT does at the business level, see next footnote. Under a personal consumption tax, an alternative approach would be to tax returns but allow a deduction for the normal return.
9. As the VAT allows deduction of input tax to all taxable persons, the expected rate of return is not taxed at the business level either. This is because the purchase value of the marginal investment asset equals the net present value of its expected returns. As the VAT on the purchase of the investment asset is deductible, by implication the normal expected return is free of VAT.

For the low-paid worker, income tax and consumption tax are perfectly equivalent. For the high-paid worker, there is a significant difference between the two types of tax. To be sure, his lifetime tax base is the same under both taxes. But under the consumption tax, most of his tax base only turns up in period 2 when his savings plus return are being consumed. Assuming that the tax rates are equal under both taxes, his advantage is postponement of tax, in comparison to income taxation.

Table 2-3. From income tax to consumption tax: stylized impact on low-paid and high-paid workers

	Low-paid	*High-paid*	*Low-paid*	*High-paid*
	income tax		*consumption tax*	
			(exemption-to-savings type)	
period 1				
wage	100	500	100	500
savings	0	200	0	200
return to savings	0	20	0	20
taxable	100	520	100	300
period 2				
wage	100	500	100	500
taxable	100	500	100	720
lifetime taxable	200	1020	200	1020

In comparison to consumption taxes, the personal income tax distorts the savings decision; the reason is that it taxes the return to savings immediately, ignoring the fact that the investor needs a normal return to be able to equate present and future consumption. In that way, the income tax discriminates against future consumption.

2.6.2.2. **The transition issue: Double taxation of existing wealth**

When an income tax is replaced by a consumption tax, the transition problem depends on the type of consumption tax chosen. With a tax of the exemption-to-savings type, the transition problem is clear: existing wealth has been created on an after-tax basis, and now it will be taxed again upon consumption. Under a VAT, the problem is the same but the collection technique is different. On the other hand, with a personal consumption tax of the exemption-to-return type, there is no transition loss to wealthy taxpayers. Under this type of tax, future consumption will be tax-free.

Goldberg[10] argues that if the consumption tax is of the exemption-to-savings type, transitional relief can be given by extending an income tax approach to old savings and assets – only the untaxed accruals would belong to the new consumption tax base. If the consumption tax is of the VAT type, he argues that no relief is required for individuals: 'the phenomenon of double taxation at the individual level does not have the appearance of being unfair. That is because the legal incidence of a VAT is on the seller. Thus only the very sophisticated would clamor for transitional rules with regard to unrecovered basis in investment assets or savings, even though there would indeed be double taxation of these

10. Daniel S. Goldberg, 'The Aches and Pains of Transition to a Consumption Tax: Can We Get There from Here?', *Virginia Tax Review* 2007(4), pp. 447-492, at p. 474-475.

amounts.' On the other hand, he believes that relief would be in place for businesses, which can deduct VAT for new purchases – but not for existing assets which used to be depreciable under the income tax.

A related consequence of the shift to a consumption tax is that the tax rates will probably need to be higher, in comparison to the (pure) income tax. As consumption taxation exempts the normal return to savings, its tax base is permanently smaller than the income tax base[11] (unless the dynamic effect of a consumption tax would be to boost investments and economic growth). There will also be temporary effects on tax revenue. Under the savings-exemption consumption tax, paying tax is postponed to the moment of consumption. A shift to this form of consumption tax will therefore cause a temporary decline in the tax base, compensated by a later increase. To the government, this different timing of tax revenues is in principle neutral (as the later tax base includes the discount rate). But it does create a temporary shortfall in revenue, to be solved by extra borrowing or additional taxation[12], for example: the one-time levy on 'old' savings if no transitional regime is offered. It has been argued that the full efficiency gain of the shift to a consumption tax is due to the lump-sum levy over 'old' capital: 'from an efficiency perspective, the tail may be wagging the dog in the debate over an income versus an [sic] consumption tax. To the extent that gains from shifting to a cash-flow tax come from the implicit lump-sum levy on existing capital, one could easily (in theory, if not political reality) achieve those same gains by imposing a one-time wealth tax on existing capital in the context of our current income tax system.'[13]

2.6.2.3. **Summary**

The shift from a pure income tax to a pure consumption tax of the savings-exemption style has clear losers: the owners of assets and savings created under the income tax. They will pay twice, while they expected to be able to consume free of tax. That transition problem does not arise when the consumption tax is of the exemption-of-revenue type. On the contrary, owners of assets may enjoy windfall gains as the returns to their investments will no longer be taxable. Under both types of consumption tax, an increase in overall tax rates can be expected.

2.6.3. **The real world issue: hybrid taxes, hybrid tax reforms**

2.6.3.1. **In general**

There are two reasons to believe that this treatment of transition issues is a bit too stylized. One is that the exemption for (returns to) savings is already quite extensive under ordinary income taxes, and affects many markets and asset values. The second is more intricate: if the 'income tax' blueprint does not exist in the real world, why would a 'consumption tax' blueprint be a credible goal of tax reform?

---

11. This could imply a redistribution of the tax burden from rich to poor; but steeper tax rate progressivity can be used to put the additional burden on the rich.
12. Intricate transitional regimes have been proposed to deal with this temporary gap in tax revenues, e.g., Mitchell L. Engler and Michael S. Knoll, 'Simplifying the Transition to a (Progressive) Consumption Tax', *SMU Law Review*, 2003 (56), pp. 53-81.
13. Joseph Bankman & Barbara H. Fried, 'Winners and Losers in the Shift to a Consumption Tax', *Georgetown Law Journal*, January, 1998, pp. 539-568, at p. 566; see their footnotes 68 and 69 for references to the relevant economic literature.

2.6.3.2. **The hybrid income/consumption tax as the relevant starting point**

Existing income taxes are already leaning towards a consumption tax model – income taxes tend to allow tax deferral for pensions, for residential investments and for business assets, and they typically have other savings incentives as well. One result is that paying income tax can often, depending on the type of savings, be postponed to a moment that the income becomes available for consumption. The second result is that the effective income tax burden is very different across types of investments, across business sectors and across occupations. If such a hybrid tax is being replaced by a pure consumption tax, effective tax rates would be aligned, creating winners and losers. E.g., if home ownership is taxed more heavily under a consumption tax, the value of residential estate will decline, perhaps substantially, while other assets may increase in value, benefiting from more beneficial tax treatment and a shift in investors' demand.

In comparison to the transition issues of a 'blueprint' shift, the main point is that a large part of personal wealth has been created under low- or non-tax conditions. Adoption of a consumption tax could mean that this wealth will never be taxed. In particular, a personal consumption tax of the exemption-for-return type would have that result. 'The bonus to yield exemption arises from taxpayers who own appreciated assets. These taxpayers have enjoyed tax deferral under the income tax regime on unrealized appreciation, and will never be taxed on those amounts. The effective forgiveness of past-deferred tax gives yield exemption a retroactive effect and a bonus to property owners that varies with the amount of their built-up appreciation in their property.'[14]

The issue is not limited to one type of consumption tax; under both types, capitalization (and net present value) effects may be intricate and depend on the type of asset. As Sarkar and Zodrow argue, for many individuals gains and losses may be offsetting, making the transition problem smaller. But even then, careful analysis would be required to see 'whether gains and losses are concentrated among certain individuals even if the net effect is small.' In the end, they believe that a 'cold turkey' approach of offering no relief is too rude; on the other hand, the traditional paradigm of 'focusing on each problem in isolation and designing a transitional rule to solve it may provide a misleading impression of the scope of the problems involved in the transition to a consumption tax.' Their conclusion is that a macro-analysis can provide the proper answer: 'an approach that estimates the net effects of such a reform on individual welfare levels provides the more relevant analysis of transitional issues.'[15]

It seems that the authors were the first to add this insight to the existing literature on transition relief.[16] It was developed further by Bankman.[17] He argues against full relief for pre-existing savings on the ground that this would overcompensate most of the holders of these savings. The shift to a consumption tax 'will on balance advantage some capital holders and will bring some advantages to nearly all capital holders.'[18] They would all suffer some loss when their pre-existing savings are brought under a consumption tax; but they would also get access to unlimited tax deferral, and have the opportunity to increase their

---

14. Goldberg, *supra* note 10, at p. 477.
15. Shounak Sarkar & George R. Zodrow, 'Transitional Issues in Moving to a Direct Consumption Tax', *National Tax Journal* (46) 1993, pp. 359-369. Given the hybrid point of departure, McNulty argues that the economic impact of a shift to consumption taxation is 'not wholly predictable, especially in transition', *supra* note 5, at p. 2126.
16. See for example Kaplow, *supra* note 1, who does discuss transition issues in the setting of general tax reform, but sticks to the relief mechanisms as identified by Graetz without noting that general rate reductions can also offer compensation.
17. Joseph Bankman, 'The Engler-Knoll Consumption Tax Proposal: What Transition Rule Does Fairness (or Politics) Require?', *SMU Law Review* (56) 2003, at pp. 83-98.
18. Bankman, *supra* note 17, at p. 89.

savings under more favourable tax conditions. The group that would on balance suffer a loss is, according to Bankman, to be identified with the wealthy elderly; their pre-existing savings may be large and their opportunity to enjoy the new tax regime for savings is limited in time, compared to the younger generations. For that specific group, he would advocate a temporary form of relief.

Bankman points at an interesting tradeoff between the size of specific compensation (a transition regime) and general compensation (through lower tax rates): the smaller the group that will be offered a transition regime, the lower the cost of this regime and hence, the lower the consumption tax rate.[19] He makes this point in passing, as an additional consideration. But it is clear that he accepts the logical priority proposed by Sarkar and Zodrow: look at overall outcomes first; subsequently identify remaining problems which may (or may not) require specific transition rules.

2.6.3.3. Successful tax reform requires political tradeoffs

The second reason to believe that transition issues are not clear-cut is that a 'model' consumption tax is not something that we would expect to survive in the political arena. A part of the transition literature is particularly naive on this issue. For example, it is argued that the income tax is 'mindnumbingly complex' and 'riddled with loopholes', a 'hodgepodge of conflicting tax rules that well-to-do and well-advised taxpayers can exploit to lessen their tax burdens' and that 'the benefit of shifting to… a consumption tax, with fewer opportunities for avoidance and evasion, is obvious.'[20] One wonders where all those well-to-do and well-advised taxpayers have gone.

The point is that, if current income taxes are based on a multitude of tradeoffs between economic interests, policy considerations, etc., it is likely that comparable tradeoffs would shape a consumption tax. The relevant issue is not how to move from an ideal income tax to an ideal consumption tax nor how to move from a compromised income tax to an ideal consumption tax. Instead, a plausible image of tax reform is moving towards more preferable rules, making compromises in the process. Transition policy choices may in fact be endogenous to the legislative process in the principal matter.[21] If politicians want to make substantial changes to the tax law, they have to balance interests. This balancing may require that they 'buy' support either by keeping the changes more modest, or by offering forms of transition relief to accompany a more substantial reform. 'A lawmaker that can avoid some of the adverse consequences associated with legal change, or cater to interest groups by limiting the transactions that will be subject to a new rule, can adopt rules that would be too politically or pragmatically costly under a requirement of full retroactivity.'[22]

---

19. Bankman, *supra* note 17, at p. 94.
20. Engler and Knoll, *supra* note 11, at pp. 53-54. David Bradford does admit that 'in our political process, complexity is a likely outcome in any regulatory regime (…). The consumption tax approach does not promise nirvana'. But he thinks it 'likely that simplicity relative to current law would result'. David Bradford, 'What's in a Name – Income, Consumption, and the Sources of Tax Complexity', *North Carolina Law Review* (76) 1997-1998, at pp. 223-228. To substantiate such a claim, one would have to show how an alternative model of taxation reduces the incentives and opportunities for politicians to create complexity. The thing is, of course, that a personal consumption tax requires a definition of income just like an income tax; *if* it is simpler in the field of capital income (but note that the consumption/savings distinction is not self-evident, e.g. in cases like consumer durables, art collections, private investment in education), this simplicity is achieved by no longer taxing it. See McNulty, *supra* note 5, at pp. 2139-2142 and accompanying references.
21. The main point made by Michael Doran, *supra* note 1; Shaviro *supra* note 1, does offer an extensive discussion of the political process of tax policy, but does not treat the choice of transitional rules as an integral part of that process.
22. Jill E. Fisch, 'Retroactivity and Legal Change: an Equilibrium Approach', *Harvard Law Review* (110) 1996-1997, at pp. 1055-1123, at p. 1119.

2.6.4. The political conceptualization of transition issues

2.6.4.1. Reasonable outcomes as a norm?

As noted in the introduction, the traditional focus in the transition literature has been on single-rule change – some authors arguing that whenever taxpayers are entitled to rely on the permanence of a rule, and that rule is nevertheless changed, they should get relief for their losses instead; others dismissing that argument as being circular (because people rely on a rule, they are entitled to rely on that rule). But there may be more to it.

The very concept of law includes an important element of stability, of legal certainty.[23] A closely related consideration – but more purposive – is that legal rules are meant to guide people's choices. And indeed, the idea of 'law as guidance' has become a prominent objection to retroactivity;[24] if the effective tax rate on some type of investment is suddenly raised from 20% to 50%, the law has arguably failed to give proper guidance to investors. Nobody has argued on such grounds that laws should never change. In areas of law – such as the law of taxation – where change occurs frequently, new changes should not come as a surprise and people may be expected to anticipate, e.g., by diversifying their risks. In legal areas with little change, people cannot be required to be cautious to the same degree. Looking at what the legislator actually does helps people to predict where and when legal change may occur.[25]

It could be argued that taxpayers are entitled, not to unalterable tax law, but to a reasonable treatment when tax laws do change. This implies not that their interests will always be protected, but that these interests have been taken into consideration in the legislative process. In that process, it can be decided that some losses do not require compensation, that other losses are sufficiently being compensated in the overall effects of a reform, and that yet other losses can only be addressed by specific measures.

For example, the transition effect that old savings are taxed twice by the shift to a consumption tax could be accepted as a second-best solution to institutional problems of the welfare state. This effect is, to a large extent, an intergenerational issue, much like increasing government debt, unsustainable public pension systems, and the costs of an ageing society – but importantly, to the advantage of the younger generations.[26] The same transition effect can also be given less weight by pointing at a historical perspective of declining effective tax rates on savings income.[27] Either way, transition losses would get a positive (or at least, non-negative) political evaluation.

Evidently, the complexities of real-world tax reforms are miles away from simple single-rule changes. In the latter case, reliance on the rule as it used to be may have significance; in the former case, the melting pot of legal changes produces outcomes which have no straightforward relation to separate elements of those changes. But what about intermediate cases?

---

23. David M. Hasen, *Legal Transitions and the Problem of Reliance*, Pennsylvania State University Dickinson School of Law, Legal Studies Research paper No. 14-2010; see also the contributions by Gribnau and Pauwels in this volume.
24. John Prebble, Rebecca Prebble and Catherine Vidler Smith, 'Legislation with Retrospective Effect, with Particular Reference to Tax Loopholes and Avoidance', *New Zealand Universities Law Review*, 22 2006, at pp. 17- 49.
25. Fisch, *supra* note 22.
26. Bankman and Fried, *supra* note 13, at p. 564.
27. Bankman, at pp. 88-89.

2.6.4.2. **The political process of defining transition issues**

We argue that much depends on political choice and skill – the presentation of legal changes as a coherent package, as well as the identification of transition losses resulting from that package. Recently, it has been advocated that tax policy should focus not on the transition issues created by changing specific rules, but on the broader outcomes of reforms: 'The framing of tax policy debates can be crucial. Framing the VAT zero-rating of children's clothing in isolation has helped maintain it; framing the estate tax in isolation also helped those lobbying for its abolition in the US. Such framing could easily result from a lack of public understanding about the interconnectedness of the tax system. However, in order to pursue sensible tax policy it is essential to see the tax system as a *system* rather than to consider its different elements in isolation. So disconnected tax debates may be particularly counter-productive for tax policy as compared with other areas of public policy. This has a lesson for the Mirrlees Review, which may need to combine tax reforms in different areas to provide a broad-based set of reform measures, making clear that there is give and take across different population groups.'[28]

The point raised here is intricate. It includes the political process of defining losses and gains in the first place. As tax law is typically complex, and fiscal illusion[29] is considerable, 'winning' and 'losing' are malleable concepts. One example is Goldberg's argument, quoted above, of why a VAT-type consumption tax would not raise transition issues for private households, while such a tax is equivalent to a personal consumption tax that does raise such issues. The form of tax rules matters, as the Mirrlees Review notes: 'While a transfer of legal tax liabilities from companies to individuals would not change the ultimate incidence at all in the long run, it will certainly look like a simple tax increase to most people.' The implication is that a move in the opposite direction would raise much less voter concern with transition losses. A second example is capitalization. If the effective future tax rate on an asset is increased by 10%, its current market value may decrease by the same percentage (in the case of full capitalization). Tax measures with respect to capital tend to be very visible for that reason, triggering demands for transition relief in response. Changes in labour income taxation would be a visible transition issue only if human capital were tradable (as in a slave society).[30]

The important point here is that the definition of transition issues is a political process. Perhaps, there will always be single tax measures so specific that they cannot credibly be presented as part of some broader package; in such cases, the 'single rule change' approach is the only one available. In all other cases, politicians have opportunities to claim coherence in policies and plausible tradeoffs in outcomes – including even areas beyond tax legislation.[31]

Evidently, such opportunities are not unlimited. For example, politicians may find it hard to give any long-term gains of changes in tax rules their proper weight. The impact of changes in tax law on people's economic choices and opportunities may require a long-term analysis, rather than the 'snapshot' of income effects upon introduction: 'Historically, distributional analyses of tax changes have classified people into income groups based on their current year's income. In recent years, a number of economists have argued that this

---

28. James Alt, Ian Preston, and Luke Sibieta, 'The Political Economy of Tax Policy', in *The Mirrlees Review, Dimensions of Tax Design* (Oxford University Press 2010), pp. 1204-1279, at pp. 1272-73.
29. The concept of fiscal illusion refers to misunderstanding of the economic burden of taxes, due to, e.g., withholding at source.
30. Kaplow, *supra* note 1, at p. 516, notes that transition issues arise with 'any action that has future effects' but discusses only investments in assets, not in human capital.
31. It is noteworthy that the central recommendations of the Mirrlees Review, while claiming to provide the 'features of a good tax system', cannot avoid talking about the 'tax and benefit system' on many occasions.

annual 'snapshot' view of the rich and poor produces an arbitrary and impoverished view of the true distributional impact of tax regimes. Legislators ought to be concerned with the distributional effects of tax changes on lifetime incomes – that is, on the lifetime rich and poor.'[32] But it may not be easy for politicians to get around the snapshot approach; for taxpayers/voters, the immediate impact of a tax reform is much more visible than any long-term offsetting effects or economic gains. As the Mirrlees Review puts it: 'While we may, rightly, be concerned primarily with tax burdens on individuals across their lifetimes, any change will come in while each individual is at a particular point in their life cycle – and they are bound to focus on its immediate impact.'[33] Long-term dynamic effects are typically not very useful in political debates, as degrees of uncertainty may be very sizeable and voters may not be too interested in the remote future. Nevertheless, long-term effects do matter. In that perspective, a focus on short-term transition losses runs a risk of being myopic.

But if we would agree that the definition of losses is not something self-evident, but a part of the political processes that produce legal change, the next question would be how the political process does identify losses. There are some hints in the literature that the demand for transition relief may be driven by interest groups. Levmore, when discussing alternative ways of abolishing a tax exemption on local government bonds, suggests that 'more retroactivity is associated with more effective interest-group pressure', adding that 'a positive political theorist could say that grandfathering provisions, delayed effective dates, and other familiar features of our legislative reform packages are evidence of the fact that it is the workings of interest-group politics that hinders retroactivity.'[34] And Doran – indeed – offers a positive analysis of the political process to explain the instrumental function of transition measures in creating political majorities.[35] One could say that the debate on moving from an income tax to a consumption tax offers an example of a fierce lobbying position. Full relief for 'old' savings would be a bonus for wealthy taxpayers – who are the only ones to gain from such a reform in the first place.

2.6.4.3. **Reasonable outcomes: a restriction on political decision-making?**

The idea that, in the political process of creating support for legal changes, transition measures are just one instrument among others cannot easily be matched with the notion of 'reasonable treatment'. In the end, of course, politicians have to face their voters at the ballots. But apart from that, is there any way to institutionalize the idea that legal changes should not inflict unreasonable losses?[36] The question – we believe – implies that norms would be required that can be applied by courts when reviewing the impact of legal changes in individual cases.

Without entering into a discussion of relevant case law, we suggest that two such norms do exist: plausibility and proportionality.

Plausibility requires that a claim of coherence has some basis in reality; e.g. because a set of legal changes has a common purpose, or because it affects overlapping groups of people at the same time in different ways which will cancel out on average. Suppose that in a court procedure, one taxpayer claims that his right to equal treatment, or to peaceful enjoyment of his property, is harmed by a new tax measure. The measure has been intro-

---

32. Bankman and Fried, *supra* note 13, at p. 547.
33. The Mirrlees Review, *Tax by Design* (Oxford: Oxford University Press 2011), Chapter 20, Conclusions and Recommendations, www.ifs.org.uk/mirrleesReview/design.
34. Saul Levmore, 'The Case for Retroactive Taxation', *Journal of Legal Studies* (22) 1993, pp. 265-307, at p. 283.
35. Doran *supra* note 1, especially at pp. 581-582.
36. This question has raised quite some academic debate in the Netherlands, following a Cabinet White Paper on tax transition policy in the 1990s. See extensively the contribution by Pauwels in this volume.

duced without any transition relief, thereby inflicting a loss of EUR 10,000. Digging into the legislative history, the court finds that the contested measure has been a part of a much larger package of legal changes, creating gains and losses for many taxpayers. For that reason, the legislator has found it unnecessary to develop specific transition measures. Probably (and without further information on the overall net position of the taxpayer who filed complaints), the court will decide to stick to a marginal test of plausibility.

Proportionality would require that the larger the remaining individual losses are, the better justifications are offered in the legislative process.[37] To pursue the example: if the taxpayer has suffered a loss of EUR 10,000 due to a single rule change without transitional relief, the court will face the question whether this loss is excessive, in terms of a proper balance of the public interest involved and the private loss inflicted.

2.6.5. **Conclusion**

Academic thought about transition issues has focused on single-rule changes. Undeniably, there are real-world cases when a single tax rule is altered, and specific taxpayers face a loss. But in many others cases, more rules change at the same time. And usually, the overall package is a political compromise that offers general compensation such as tax rate reductions, while ignoring some losses and providing specific relief for others.

A discussion of the major tax reform discussion in the US, a shift from income tax to consumption taxation, shows how the rule-based approach runs into difficulties. Even when we compare two blueprints, the ideal income tax and the pure consumption tax, transition issues are hardly clear-cut. As soon as we accept real-world hybrid taxes, it becomes much more difficult to predict transition effects. The practical approach would no doubt be to evaluate the overall effects of such a reform, and see which remaining losses require specific measures.

There is no objective way to distinguish between the single-rule case and the tax-reform case. The decision to present measures in a package is a political one though it can be subjected to tests of plausibility and proportionality.

37. The contribution by Pauwels develops such a proportionality test.

Part 3
National reports

3.1.
Questionnaire

Hans Gribnau and Melvin Pauwels

3.1.1. Preliminary general remarks

There are different concepts with various meanings when dealing with the phenomenon of retroactivity in legislation. Not only are various concepts used for 'retroactivity' (e.g., retroactivity, retrospectivity, formal retroactivity, material retroactivity and true retroactivity) but the same concept is often used with different meanings (viz., the concepts of retroactivity and retrospectivity[1]).

In this questionnaire, the term 'retroactivity' means that the effective entrance date of (one of more provisions of) a statute is set at a date prior to the moment on which the statute enters into force (in the Dutch tax literature, this is called 'formal retroactivity'), i.e. (one of more provisions of) the statute covers the period before the date of entry into force. For example, a statute enters into force on 1 February 2010, and provides that a certain tax exemption is repealed as from 1 January 2009.

The term 'retrospectivity' means that the statute has 'immediate effect' (i.e., the effective entrance date of a statute is the same date as the date on which the statute enters into force) without grandfathering, as a result of which the statute alters or affects the results of a past event for the future (in the Dutch tax literature, this is called 'material retroactivity'). For example, a statute enters into force on 1 January 2010, and provides that a certain tax exemption is repealed as from that date without grandfathering accrued but unrealized gains, as a result of which gains that accrued prior to 1 January 2010 are not tax exempt although they accrued in a period when the exemption applied.

Furthermore, if a reference is made in this questionnaire to the introduction of a tax statute, this includes the change (amendment) of an existing tax statute, for there is no conceptual difference between the two. After all, a change in an existing statute is realized by means of the introduction of a statute that provides for the change.

---

1. See, e.g., the editors of British Tax Review, 'Retroactive or Retrospective? A Note on Terminology', *British Tax Review*, (2006), at pp. 15-18.

3.1.2. **On terminology**

1. In Dutch legal discourse, a distinction is usually made between formal retroactivity (here: retroactivity) and material retroactivity (here: retrospectivity).

a. Does legal discourse in your country usually employ concepts like 'retroactivity' and 'retrospectivity'?
b. Is a clear distinction usually made between 'retroactivity' and 'retrospectivity'?

2. It would appear to be the case that, although the above-mentioned distinction between the two kinds of retroactivity (i.e., retroactive effect and retrospective effect) is recognized in most countries, there are some additional varieties. A first conceptual variation concerns the situation where, during a fiscal year, the income tax rules are changed as from the beginning of the fiscal year. For example, an income tax statute enters into force on 1 July 2009, and provides that a certain tax exemption is repealed as from 1 January 2009. In the Netherlands this would be regarded as retroactive. It would appear that in some other countries it would not be regarded as (actually) retroactive, because – it is argued – the income tax obligation only arises at the end of the year. In these countries a conceptual distinction is made between a statute that applies to a previous year (*actual retroactivity*) and a statute that applies as from the beginning of the current year (*de facto retroactivity*).[2]

a. Does legal discourse in your country usually employ this conceptual distinction?
b. If the conceptual distinction is employed in your country, please discuss, when answering the questions in section 3.1.3, 3.1.4, and 3.1.5 and question 20 in section 3.1.7 whether this distinction is materially significant, e.g., whether different standards apply.

3. A second conceptual variation concerns what are known as interpretative statutes,[3] which are statutes that provide for the interpretation of another statute and are often applicable as from the effective entrance date of that other statute. The Netherlands legal system does not explicitly have the phenomenon of 'interpretative statute'. If the Netherlands legislator introduces a statute with retroactive effect and explains that the statute provides an interpretation (i.e., only clarifies the meaning) of another statute, this statute is considered 'retroactive' in Dutch legal discourse.[4] It would appear, however, that in some countries such a statute would not be called 'retroactive' and/or that in some countries, it is even explicitly provided in the Constitution or the General Tax Act that interpretative statutes apply as from the effective entrance date of that of the statute to which the interpretation applies.

a. Does the legal system of your country explicitly have the phenomenon of 'interpretative statute'?
b. If so:
   i. does the retroactive effect of such a statute has a legal basis in the Constitution or the General Tax Act?
   ii. is there a special term for this kind of 'retroactivity'?
   iii. what standards are used to determine that the 'interpretative statute' is actually 'interpretative'? Is it regarded as a problem that the statute possibly con-

2. V. Thuronyi, *Comparative Tax Law* (The Hague: Kluwer Law International, 2003), at pp. 79-80.
3. Thuronyi, *supra* note 2, at p. 76, mentions *lois interprétatives* (France), declaratory legislation (United Kingdom) and *legge di interpretazione autentica* (Italy).
4. Notwithstanding this, when assessing (e.g., by parliament or by the courts) whether the (proposed) retroactive effect is justified, it could be taken into account that the statute 'only' provides a clarification.

firms the view of the tax authorities, while (some) taxpayers have a defensibly/justifiably different interpretative view?

iv. when answering the questions in sections 3.1.3, 3.1.4, and 3.1.5 and question 22 in section 3.1.7, please discuss whether different standards are used for examining retroactivity of interpretative statutes (in comparison with the normal standards used to examine retroactivity).

4. A third conceptual variation concerns what are known as validation statutes. A judicial decision may deviate from the legal practice (shared view by taxpayers and tax authorities) or the view of the tax authorities. It may happen that the legislator then introduces a statute with retroactive effect to 'validate' the legal practice or the view of the tax authorities. Although it sometimes happens that the Netherlands tax legislator will introduce a statute with retroactive effect to 'overrule' a judicial decision, the phenomenon 'validation statute' is not recognized as such.

a. Does your legal system recognize the phenomenon of 'validation statute' as such?
b. If so:
   i. which standards are used to determine that the 'validation statute' really validates legal practice (and not only the unilateral view of the tax authorities)?
   ii. what is the difference between a 'validation statute' and an 'interpretative statute' (if, in your country, this phenomenon is also separately recognized)?
   iii. when answering the questions in section 3.1.3, 3.1.4, and 3.1.5 and question 22 in section 3.1.7, please discuss whether different standards are used for examining/assessing retroactivity of validation statutes (in comparison with the normal standards used to judge retroactivity).

5. In the Netherlands legal system, the date of the entry into force of a statute should be on or after the date of publication of the statute in the Government Gazette. A conceptual distinction is made between the date of entry into force of a statute and the effective date of a statute. If retroactive effect is granted to a statute by the legislator, the date of entry into force is still a future date, but the statute's effective entrance date is a date in the past. This explains why, at least in Dutch legal discourse, the relevant moment to use for comparison in order to determine whether a statute has retroactive effect is the date of the entry into force of the statute.

a. Does legal discourse in your country also employ a difference between the date of entry into force of a statute and the effective date of a statute? And is the 'comparison moment' also the moment of entry into force, or is it the moment of the publication in the government's official journal?

6. Although in Dutch legal discourse material retroactivity ('retrospectivity') is distinguished from formal retroactivity, there is no one definition of material retroactivity that is generally accepted and used. Furthermore, it is not clear which situations are ones of 'material retroactivity'. The above-mentioned example of a statute that enters into force on 1 January 2010, and that provides that a certain tax exemption is repealed as from that date without grandfathering accrued but unrealized gains, would certainly be regarded as an example of 'material retroactivity'. However, if a statute that enters into force and that stipulates that interest on a certain type of loan is no longer tax-deductible without grandfathering existing loans, many but not all authors would call this 'material retroactive'.

a. How is the concept of retrospectivity defined in your country?
b. Please provide some examples of situations that would be regarded as retrospective and – if possible – some examples of situations that would not be regarded as retrospective.

7. With respect to the impact of a statute having 'immediate effect', a distinction is usually made between substantive statutes and procedural statutes. A substantive statute with immediate effect applies to taxable events occurring after the date on which the statute enters into force, while a procedural statute with immediate effect is directly applicable on pending proceedings (so also to proceedings regarding taxable events that occurred prior to the date on which the statute enters into force).[5]

a. Is this distinction (with respect to the impact of a statute having immediate effect) between substantive statutes and procedural statutes also made in your country?
b. If so, what kind of tax rules are considered procedural rules (e.g., also rules regarding evidence and the burden of proof)?

NB (i) If relevant, please state two differences in the use of the concepts in the tax literature, case law, and parliamentary history;
(ii) If the meaning of or the application of concepts differs in your country depending on the nature of the tax concerned (e.g., (corporate) income tax, VAT, withholding tax, etc), please discuss.

3.1.3. Ex ante evaluation of retroactivity

8. In some countries, the Constitution imposes limitations to retroactivity of tax statutes. There seem to be three variants: (i) the limitations are derived from a general principle (e.g., the principle of legal certainty, the principle of legitimate expectations, the principle of equality, the principle of the rule of law, and the ability-to-pay principle) that is laid down in the Constitution, (ii) the limitations are explicitly laid down in a general[6] provision, (iii) the limitations are explicitly laid down in a provision that specifically regards taxation.

a. Does your Constitution include a provision that imposes limitations to the retroactivity of tax statutes? If so, what variant(s)?

9. The Netherlands State Secretary of Finance has published (and discussed with parliament) a memorandum that incorporates the main lines of his 'transition policy' with respect to the introduction of tax statutes. The memorandum is not legally binding, but it has some influence in the parliamentary debate, for example, in the event that a bill includes retroactive effect.

a. Does the government of your country have a transition policy in general and/or in the field of tax statutes, and, if so, has the policy been published?
b. If so, in what form has this been done, e.g., in a kind of memorandum or an Act? To what extent is this policy legally binding, e.g., does it only have influence in the parliamentary debate or do judges also take the policy into account if they test transitional law for compatibility?

a. If a transition policy in the field of tax statutes has been published, what are the policy guidelines with respect to (i) granting retroactive effect to statutes and (ii) grandfathering?
b. Is there also a policy with respect to granting retroactive effect to tax statutes that are favourable to taxpayers?

---

5. E.g., ECJ C-61/98 (*De Haan*), para. 13: 'It should be noted in this connection that, according to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force.'
6. Not only regarding tax statutes.

10. In the Netherlands, the Council of State provides advice to the government and parliament with respect to legislative proposals. The Council of State has laid down criteria with respect to the question of when, in its opinion, granting retroactive effect to tax statutes is allowed.

a. Does an institution like a Council of State (Conseil d'État) exist in your country? NB.: It might be that in your country instead of, or in addition to, the Council of State, another institution (e.g., the Supreme Court) could be asked for advice. If so, please answer the following questions (also) for that other institution.
b. If so, does it follow certain rules to review proposed retroactivity in tax statutes?
c. And does it follow certain rules to review whether or not grandfathering is necessary?
d. Is there also a policy with respect to granting retroactive effect to tax statutes that are favourable to taxpayers?

3.1.4. Use of retroactivity in legislative practice

11. In the Netherlands, the legislator occasionally makes use of the instrument of 'legislating by press release':[7] it is announced in a press release that a bill is (or will be) proposed in parliament and that the bill provides for retroactivity till the date of the press release.

a. Is this instrument used in your country?
b. If so, in which cases? E.g., only in cases of anti-abuse legislation or also in cases of a policy change and if the government wants to prevent so-called announcement effects?

12. Sometimes the Netherlands tax legislator grants retroactive effect to tax statutes reaching further back in time from the moment of the first announcement (e.g., by press release) of the bill in question.

a. Does your legislator grant retroactive effect in cases in which the instrument of 'legislating by press release' is not used? If so, in which cases?
b. And does the retroactive period reach further back in the past than the date of the press release? If so, in which cases?

13. If the retroactive period is long, it could be that pending legal proceedings are influenced.

a. Does it happen in your country that retroactive effect is granted to substantive statutes as a result of which also pending legal proceedings are influenced?
b. Or is it common that pending legal proceedings are excluded from the application of the new statute?

14. In the Netherlands the legislator sometimes grants retroactive effect to tax statutes that are favourable to taxpayers.

a. If that also happens in your country, in which situations does it occur?

7. For an example, see the disputed retroactivity in the *Stichting Goed Wonen II* case (ECJ C-376/02).

3.1.5. **Ex post evaluation of retroactivity (in case law)**

Courts may or may not test acts of parliament against the national Constitution. In Netherlands law, the courts are not allowed to test acts of parliament for compatibility with the Constitution or with general legal principles, because of a constitutional prohibition to do so. The courts are, however, permitted to test acts of parliament for compatibility with international treaties: as far as such an act infringes a treaty provision that has direct effect, the courts must not apply the act. Furthermore, the courts are allowed to examine subordinate legislation (i.e. not acts of parliament) for compatibility with legal principles.

With respect to the possibilities that a Netherlands court has to review the retroactivity of tax regulations, the above implies that:

- the retroactivity of an act of parliament on a tax matter cannot be tested against the principle of legal certainty (nor against the principle of legality);
- however, if an act of parliament on a tax matter falls within the scope of European Community law, the retroactivity of such an act can be tested against the general principles of European Community law, viz., the protection of legitimate expectations and legal certainty;
- the retroactivity of an act of parliament on a tax matter can also be tested against Article 1 of the First Protocol ('protection of property') to the European Convention on Human Rights (ECHR), although the Netherlands Supreme Court has – up till now – never found retroactivity incompatible with that provision;
- the retroactivity of subordinate legislation can be tested against the principle of legal certainty.

15. In the legal system of your country is it possible for courts to test the retroactivity of a tax statute for compatibility with the Constitution and/or with general legal principles such as the principle of legal certainty (including the principle of legitimate expectations)?

16. If, in your country, courts can test the retroactivity of a tax statute against the Constitution and/or with general legal principles, what examination method do courts apply? In other words: when would courts rule retroactivity incompatible?

17. Do the courts in your country test the retroactivity of a tax statute against Article 1 of the First Protocol ECHR? If so, have the courts ever found a tax statute containing retroactivity incompatible with Article 1 of the First Protocol ECHR?

18. If the courts in your country test the retroactivity of acts of parliament and/or subordinate legislation against the principle of legal certainty, which examination method do the courts apply?

19. Do courts in your country use interpretations that avoid what might be retroactive applications, because such applications might raise further questions about legitimacy and validity?

20. If courts in your country do not recognize limits on the use of retroactivity, is there a reason, e.g., the legislator is regarded as being sufficiently self-disciplined?

NB.: regarding questions 15-20: (i) please discuss justifications that are accepted by the courts in your country for granting retroactive effect by the tax legislator, and (ii) if there are examples of cases in which the court found retroactivity incompatible, please discuss these cases briefly.

3.1.6. **Retroactivity of case law**

The issue of retroactivity of tax law not only arises with respect to the introduction of tax statutes, but also with respect to case law when a judgment has an *erga omnes* effect. The topic of retroactivity of case law is worth investigating separately, because it is related to the question of the nature of case law: when can case law be regarded as declaratory ('only declaring what the law has ever been') and when can it be regarded as constitutive ('new law'). We will not deal with this here.[8]

Nonetheless, at least in one situation transitional law with respect to case law is very comparable with the transitional law question with respect to changes in statutes. In that situation, the court explicitly abandons existing case law and formulates a new (general) rule.

21. If the Supreme Court of your country abandons existing case law and formulates a new (general) rule, does the Supreme Court provide for a kind of transitional rule to limit the retroactive effect of its judgment (e.g., prospective overruling)? If so, does the Supreme Court only provide such a rule if the new rule is unfavourable to taxpayers, or also if the new rule is favourable to taxpayers (and thus unfavourable to the government)? If the latter is the case, does the Supreme Court make an exception for the taxpayer concerned in the legal proceedings before the court?

> *NB.: If there are peculiarities[9] in the tax system of your country that are relevant for understanding the way the Supreme Court rules in this respect, please state these peculiarities.*

3.1.7. **Views in the literature**

3.1.7.1. **In general**

22. Is there a general opinion in the tax literature of your country regarding retroactivity of tax statutes? Is there, for example, consensus with respect to the type of cases (e.g. anti-abuse legislation, legislation to abandon gaps in tax law, policy changes, etc.) in which it is considered justified (or the other way around: in which it is in any case considered not justified) to grant retroactive effect to tax statutes?

3.1.7.2. **The law and economics view**

The law and economics view is an important theoretical view in the academic literature in the US on tax transitions. This view was developed and supported by, in particular, Graetz[10]

---

8. Various items that relate to the subject of 'retroactivity of case law' (e.g. the item of limitation of the effects of case law of the European Court of Justice) are therefore not touched upon in this questionnaire, either.
9. For example, if the Netherlands Supreme Court changes its interpretation of a certain statute in favour of the taxpayers, the retroactive effect of that judgment is *de facto* limited because previously paid tax on a tax assessment will not be refunded, unless an appeal against the tax assessment has been made in time (i.e., within six weeks after the date of the assessment). It might be, however, that the tax system of another country is different, for example, in the sense that, in the situation described, a refund should be made by the tax authorities if it is clear that tax has been paid unnecessarily (according to the new interpretation). Since the financial consequences for the government of a change of interpretation may be great, this might be a reason for the Supreme Court for 'prospective overruling'.
10. M.J. Graetz, 'Legal Transitions: The Case of Retroactivity in Income Tax Revision', *University of Pennsylvania Law Review* (1977), at pp. 47-87, and M.J. Graetz, 'Retroactivity Revisited', *Harvard Law Review* (1985), at pp. 1820-1841.

and Kaplow.[11] Briefly, the law and economics view on tax transitions argues that changes in tax law should have retroactive effect[12] because that is 'efficient'. A very short summary of the line of reasoning is provided by, among others, Fisch.

'Although fairness arguments are typically used to support prospective lawmaking, efficiency is generally viewed as favoring retroactivity. Efficient lawmaking can be defined as lawmaking that maximizes the net benefits of legal change. The traditional economic conception of rational or efficient legal change is based on the utilitarian conception of a net gain in social welfare without regard for distributional issues. This conception explains the failure of economic analysis to address the moral concerns of fairness arguments. Retroactivity could produce net social gain and yet impose clearly identifiable costs; there are winners and losers when a law is applied retroactively. Efficiency arguments typically add an additional normative factor to the analysis: the assumption that legal change has occurred because of a determination that the new rule is an improvement. The view that the new rule improves the operative legal principles supports the application of that rule to as broad a class of cases as possible.'[13]

In the meantime, other law and economics scholars (than Graetz and Kaplow) have developed views with a different emphasis. Shaviro, for example, argues that policy changes should be retroactive (in the terminology used here: should be retrospective), but should not be nominally retroactive (in the terminology used here: should not be retroactive).[14]

23. In the Netherlands the law and economics view has so far provoked very little debate in the tax literature and has not been invoked explicitly by the legislator or the Netherlands State Secretary of Finance during parliamentary debates.

a. Has the law and economics view on transitional tax law, or other non-traditional legal views, provoked a debate in your country?
b. If so, please provide a brief overview of the debate, and please state especially whether and, if so to what extent, the law and economics view (especially the dogmatic view of Graetz and Kaplow), or another non-traditional legal view, has gained support, e.g., from the legislator or in the tax literature.

11. L. Kaplow, 'An Economic Analysis of Legal Transitions', *Harvard Law Review* (1986), at pp. 509-617, and L. Kaplow, 'Transition Policy: A Conceptual Framework', *Journal of Contemporary Legal Issues* (2003), at pp. 161-209.
12. The economic view holds that there is no fundamental (but only a gradual) difference between (formal) retroactivity and retrospectivity.
13. J.E. Fisch, 'Retroactivity and Legal Change: An Equilibrium Approach', *Harvard Law Review* (1997), at p. 1088.
14. D.N. Shaviro, *When Rules Change: An Economic and Political Analysis of Transition Relief And Retroactivity* (Chicago: University of Chicago Press, 2000), at pp. 98-111.

3.2.
Austria[1]

Tina Ehrke-Rabel

3.2.1. On terminology

3.2.1.1. Distinction between retroactivity and retrospectivity

The legal discourse in Austria usually employs concepts like 'retroactivity' and 'retrospectivity'. In Austria difference distinction is made between 'real' and 'unreal' retroactivity.[2]

The Austrian Constitutional Court distinguishes clearly between retroactivity and retrospectivity. However, court decisions are not very clear on the permissibility of retrospectivity in Austrian tax law.

3.2.1.2. Relevance of tax period

In Austria this conceptual distinction is not made. The terms 'retroactivity' and 'retrospectivity' refer to the relationship between the moment of entry into force of a statute and the moment the taxable event is realized. If the statute applies to a taxable event realized prior to the entry into force of this statute, there is retroactivity. If a newly enacted statute applies to pending situations (situations that 'started' prior to and 'conceal' the entry into force), there is retrospectivity.

3.2.1.3. Interpretative statutes

Austria does not explicitly have 'interpretative statutes'.

In fact, interpretative statutes sometimes 'occur'. The Austrian Constitutional Court explicitly allows this kind of statute (e.g. VfGH 10. 10. 1988, G 121/88, VfSlg 11.869). Since the Constitutional Court does not apply any specific methods with respect to the legitimacy of such statutes, there is no academic debate on the issue.

Interpretations of legal statutes are currently made by formally non-binding and generally addressed administrative rulings published in the official journal of the tax administration. Nevertheless, in practice questions of retroactivity and retrospectivity occur in this field. Generally, the tax administration provides for a grandfathering clause. Since these administrative rulings formally do not have any binding effect, academic discussion on the topic is rare.

---

1. Editors' Note: the replies in this report were provided to the original questionnaire. Due to circumstances beyond his control, the author was not able to finalize the draft of his national report and to use the headings proposed by the editors. The headings used in this report have thus ben added by the editors. See also M. Lang & C. Marchgraber, 'Retroactivity and Legitimate Expectations in Austrian Tax Law', B. Yalti, ed., *Non-Retroactivity in Tax Law* (Istanbul: Beta, 2011), at pp. 15-26.
2. W. Doralt & H.G. Ruppe, *Steuerrecht II*[5] (Wien: Manz, 2006), Tz 368ff.

Since interpretative statutes do not have an explicit legal basis in Austria their retroactive effect does not have a legal basis, either.

If a new statute does not add anything to an existing statute that is outside the scope of this existing statute, we talk about an interpretative statute. Statutes are considered to be interpretative if they only clarify what was already the content of the existing statute (e.g. VfSlg 13.197/1992).

It is not regarded as a problem that the statute possibly confirms the view of the tax authorities, while some taxpayers have a defensibly/justifiably different interpretation. On the contrary, if there are different defensible/justifiable interpretations of a statute the taxpayer cannot trust a certain interpretation. Consequently, a statute that narrows the range of defensible/justifiable views of an existing statute is not considered to create illicit retroactivity.

The Austrian Constitutional Court basically applies the same standards to interpretative statutes as to other kinds of statutes.

3.2.1.4. **Validation statutes**

The Austrian legal system does not recognize the phenomenon of 'validation statute' as such.

3.2.1.5. **Comparison moment**

Austrian legal discourse does not make a clear distinction between the date of entry into force of a statute and its effective date. Generally a statute enters into force the day after its publication in the Government Gazette. It can enter into force on a date either prior or posterior to its publication in the Government Gazette if this is explicitly stated in the statute itself. Basically retroactivity within the meaning employed in this paper must be explicitly laid down in the statute itself, whereas retrospectivity is normally the consequence of the fact that the statute does not provide for any special date of entry into force and therefore also applies to 'pending' cases.

3.2.1.6. **Concept of retrospectivity**

Apparently the Austrian concept of retrospectivity is similar to the Dutch concept: Unlike for retroactivity there is no common opinion on whether a statute creates retrospectivity or not.

The selling of shares held by an individual is subject to income tax only if the shares were held for less than a year. A legal statute that replaces the term of a year by a term of five years without any statement concerning the entry into force of this provision might affect the selling of shares performed by a person that bought the shares prior to the date of entry into force of this statute. Therefore, this statute is considered to have retrospective effect.

3.2.1.7. **Distinction between substantive and procedural statutes**

This distinction is also made in Austria. Substantive legal statutes have retroactive effect only if this is explicitly stated in the statute itself, whereas procedural statutes automatically (without any explicit statement) have retroactive effect.[3]

3. G. Stoll, *Bundesabgabenordnung-Kommentar* (Wien: Orac, 1994), 68; A. Mairinger & B. Twardosz, 'Die maßgebliche Rechtslage im Abgabenrecht', *ÖStZ* 2007, 16ff; VfGH 22. 6. 2009, G 5/09ua.

All rules regarding the filing of tax returns, the collection of taxes, the appeal procedure, evidence and the burden of proof are considered procedural rules. Rules regarding evidence and the burden of proof would have to contain a grandfathering clause in order not to infringe the constitutional principle of legitimate expectations. Periods of limitation are generally considered to be substantive tax rules. However, there are some judicial decisions and concepts in the academic literature that consider periods of limitation to be procedural rules.

3.2.2. Ex ante evaluation of retroactivity

3.2.2.1. Constitutional limitations to retroactivity of tax statutes

The case law of the Austrian Constitutional Court imposes limitations of retroactivity on tax statutes by basically deriving them from the principle of equality and its 'sub'-principles of legitimate expectations and legal certainty.

3.2.2.2. Transition policy of government

The Austrian government does not have a declared transition policy either in general or in the field of tax statutes. However, there are certain legal situations in which the Austrian Government regularly provides for transitional rules.

In Austria there is no policy with respect to granting retroactive effect to tax statutes that are favourable to taxpayers at all.

3.2.2.3. Ex ante control by an independent body

In Austria there is no institution which can be asked for advice with respect to legislative actions.

3.2.3. Use of retroactivity in legislative practice

3.2.3.1. 'Legislating by press release

This instrument has never been used in Austria. It might be a way to reduce the confidence in the existing legal situation which is generally protected by the Austrian Constitution and therefore legitimate the retroactivity of the new statute. But since Austrian legal practice and case law are very reluctant to admit binding effects of 'explanations' which do constitute a formal source of law, this instrument would probably not be accepted. Moreover, the Austrian Constitutional Court explicitly holds that taxpayers who comply with the legal situation in force are protected in their expectations in the validity of this situation and are not supposed to orientate their behaviour according to plans, political projects or academic discussions.[4]

3.2.3.2. Retroactive effect further back than first announcement

Since the instrument of press release does not exist in Austria the legislator grants retroactive effect in other cases. A general statement concerning these cases cannot be made. The granting of retroactive effect seems to be somehow discretionary. Thus, if retroactivity is necessary to comply with the principle of equality, it is granted as a rule.

4. *VfSlg* 15.060/1997.

3.2.3.3. **Pending legal proceedings**

The major cases on retroactive legal statutes decided by the Austrian Constitutional Court concerned substantive statutes and also influenced pending legal proceedings.

3.2.3.4. **Favourable retroactivity**

This happens from time to time in Austria generally for certain policy reasons.

3.2.4. **Ex post evaluation of retroactivity (in case law)**

3.2.4.1. **Testing against the Constitution and legal principles**

The Austrian Constitutional Court has the authority to test the retroactivity of a tax statute for compatibility with the Constitution and with general principles. Retroactivity is tested against the principle of equality and its sub-principles of legal certainty and legitimate expectations. The Austrian Constitutional Court acts on the request of either an individual concerned by the statute himself or on request of the Austrian Federal Administrative Court or on request of a certain number of members of parliament.

3.2.4.2. **Examination method**

According to the case law of the Austrian Constitutional Court, legal statutes with retroactive effects can infringe the principle of equality in so far as they constitute a belated burden for the taxpayer who acted in the expectation of a certain (less burdensome) legal situation. In other words: Retroactivity would only be incompatible with the principle of equality if it destroyed legitimate expectations. To consider whether these expectations are destroyed the Austrian Constitutional Court looks at the clarity of the legal statute being changed and unanimous administrative practice. Consequently, retroactivity is incompatible with the Austrian Constitution if the taxpayer was deceived in its expectations in a legal statute by its retroactive change constituting a substantive increase of his tax burden. Even this situation could be legitimate if there is a substantive justification. Whether the principle of legitimate expectations is infringed or not depends on the significance of the tax burden created by a legal statute and on the gravity of the grounds of justification for introducing this tax burden.[5] These criteria have to be weighed case by case.

3.2.4.3. **Testing against Article 1 of the First Protocol ECHR**

The Austrian Constitutional Court does not test the retroactivity of a tax statute against Article 1 of the First Protocol ECHR because the protection of property is a principle inherent in the Austrian Constitution itself. Moreover, retroactivity is not tested against this principle.

3.2.4.4. **Two cases in which the Austrian Constitutional Court considered a retroactive legal statute to infringe the principle of equality**

The 'Bundesland' Tirol introduced a procedural provision that allowed tax authorities to reverse non-reversible tax assessments if incompatibility with EC law had been held by the ECJ. The Austrian Constitutional Court considered this provision incompatible with the

5. E.g. *VfSlg* 12.186/1989, 12.416/1990, 13.020/1992, 15.060/1997.

principle of legitimate expectations: Before the entry into force of this new provision after one year taxpayers could trust in the non-reversibility of their tax assessment – without any respect to the substantive legality. This new provision was applied to a tax assessment having become non-reversible many years before. Therefore, for the Austrian Constitutional Court this provision significantly breached the legitimate expectations of the taxpayer. The Court did not find a justification for this provision that would have been able to heal the infringement of the legitimate expectations principle.[6]

In Austria corporate entities have to pay a minimum corporate income tax regardless of the amount of their income (which can be negative as well). This minimum tax was increased in 1997. The entryy into force of the respective legal provision was stated at a date prior to the publication in the Gazette of the Government. Consequently, it had retroactive effect. According to the case law of the Austrian Constitutional Court, legal statutes applying to previously effected factual situations and retroactively adulterating the legal position of the taxpayer infringe the principle of equality if the taxpayer's situation is significantly impaired and if the taxpayer had the right to trust in a certain legal situation. The Constitutional Court ascertained that these criteria were fulfilled. The retroactivity of the provision in question therefore constituted a breach of the principle of equality.[7]

3.2.5. Retroactivity of case law

Since Austria is a civil law system the question of retroactivity of case law arises only in the case of the Constitutional Court. According to the legal statutes regulating the competences of and the procedure before this Court, the Constitutional Court's decisions with respect to the compliance of legal statutes with either the Austrian Constitution itself or constitutional principles do not have retroactive effect. They apply to factual situations occurring after the Court's decision has been rendered. Nevertheless, there are two exceptions:

- The decision does have retroactive effect for the person who brought the case before the Court. This rule applies regardless of whether the decision is favourable or unfavourable to this person.
- The Court itself can delay the effects of its decision to a certain moment later than the date of the rendering of the decision.

As a general rule, the case law of the Austrian Supreme Court, the court which decides on the interpretation of legal statutes and not on their compliance with constitutional law or principles, is binding in the case brought before the Court and does not have an 'erga omnes' effect. But in practice this interpretation in a single case is applied to other similar cases as well. Consequently, a 'new' interpretation of a legal statute can be applied to cases pending at the moment of the decision of the Supreme Court (and of course to every other situation occurring after the decision was rendered). But such a new interpretation does not give the procedural right to adapt non-reversible decisions.

3.2.6. Views in the literature

3.2.6.1. Opinions regarding retroactivity

Austrian fiscal literature does not deal with the problem retroactivity in a way that goes beyond the case law of the Constitutional Court.

---

6. VfGH 22. 6. 2009, G 5/09.
7. *VfSlg* 15.060/1997.

3.2.6.2. **Debate on law and economics view on transitional law**

The law and economics view on transitional tax law, or other non-traditional legal views, has not provoked any debate in Austria.

3.3.
Belgium

Bruno Peeters
Ethel Puncher

3.3.1. Terminology

3.3.1.1. Distinction between 'retroactivity' and 'retrospectivity'

In the older Belgian literature, the expressions 'relative retroactivity' and 'absolute retroactivity' were used to distinguish between 'retroactivity' and 'retrospectivity'.[1] These expressions correspond to the concepts of 'formal retroactivity' and 'material retroactivity' as used in Dutch legal discourse. However, the terminological distinction between relative and absolute retroactivity is nowadays considered confusing in Belgium.[2]

In the more recent literature (and case law), a clear distinction is usually made between three concepts, being 'immediate effect', 'retroactive effect' and 'deferred effect'.[3]

As a principle, a legal rule is deemed to have 'immediate' or 'retrospective' effect.[4] This implies that a new legal rule is applicable both to legal facts that occur after the date of entry into force of this new rule, and to legal consequences occurring after the date of entry into force, even though these consequences relate to legal facts that took place before this date.[5] To explain the preference for the concept of immediate effect of legal rules, reference is usually made to the principle of unity of the law: in each situation and for each period only one legal rule can be applied at a time.[6]

A legal rule is considered to be retroactive, however, when it affects legal facts that occurred before its date of entry into force.[7] In other words: a legal rule is retroactive when it is applicable to juridical relations that were already definitively completed before this date.[8]

---

1. H. de Page, *Traité élémentaire de droit civil belge*, I, No. 230 (Brussel: Bruylant, 1962), at p. 328.
2. F. Amerijckx, 'Non-retroactiviteit terzake rijksbelastingen' in: X, ed., *Liber Amicorum Albert Tiberghien* (Antwerpen: Kluwer, 1984), p. 1 ff., at p. 10.
3. P. Popelier, *Toepassing van de wet in de tijd: vaststelling en beoordeling van temporele functies* (Antwerpen: Story-Scientia, 1999), at pp. 31-33.
4. B. Peeters, 'Beschouwingen bij de temporele werking van wetten in de inkomstenbelastingen', in: B. Peeters, ed., *Recht zonder omwegen: fiscale opstellen aangeboden aan Prof. Dr. J.J. Couturier ter gelegenheid van zijn 75ste verjaardag* (Gent: Larcier, 1999), p.83 ff., at p. 90.
5. This wording can be found in the case law of both the Constitutional Court (e.g. Arbitragehof 22 December 1993, No. 88/93, www.const-court.be) and the Supreme Court (e.g. Cass. 22 February 1988, *Arr. Cass.* 1987-88, 808; Cass. 21 February 2003, *Pas.* 2003, I, No. 127). Please note that the name of the Constitutional Court has recently been changed from 'Arbitragehof' to 'Grondwettelijk Hof' (Revision of the Constitution of 7 May 2007, *B.S.* 8 May 2007).
6. B. Peeters, 'Het onderscheid tussen de onmiddellijke en de retroactieve werking van een wet inzake inkomstenbelastingen', (case note on Cass. 25 May 2000), *T.F.R.* 2000, p. 679 ff., at p. 680.
7. Popelier, *supra* note 3, at p. 32.
8. This wording can be found in the case law of the Constitutional Court (e.g. Constitutional Court, 30 March 2010, No. 32/2010, consideration B.12.2; Arbitragehof 22 November 1990, No. 36/90, www.const-court.be).

Finally, a legal rule has deferred effect when the former rule is still applied on the future consequences of legal facts that took place before the date of entry into force of the new rule.[9]

3.3.1.2. **Relevance of tax period**

As far as income tax is concerned, a distinction is made between 'de facto retroactivity' and 'actual retroactivity' (juridical retroactivity). The income tax obligation is deemed not to arise until the end of the tax period. As a consequence, an income tax rule can be changed during a tax period and applied as from the beginning of the same tax period, without having a prohibited (juridical) retroactive effect.[10] Indeed, nothing can prevent the legislator from conferring an immediate effect to a tax measure when the 'tax situation' is not yet acquired permanently. Concerning income tax, a tax situation must be considered as acquired permanently at the end of the fiscal year.[11] This position has been confirmed repeatedly in the decisions of the Constitutional Court.[12]

The Supreme Court has recently adopted the same view as the Constitutional Court.[13] Formerly, however, the Supreme Court was of the opinion that a changed income tax rule could only be considered retroactive when it was published after the end of the assessment year. To grasp the full extent of this opinion, a clear distinction has to be made between the tax period (i.e. the period during which income is earned: year x) and the assessment year (i.e. year x+1). According to the Supreme Court, the applicable income tax rules for year x could not only be changed up to 31 December of year x, but even as late as 31 December of year x+1, without being considered (actually) retroactive.[14] This interpretation had as a result that a taxpayer had to bring his case before the Constitutional Court to enjoy a more favourable interpretation of retroactivity.[15] Not unsurprisingly, this interpretation was severely criticized in the tax literature.[16]

It should be noted that the situation discussed above is only applicable to direct taxation (such as income tax). For an indirect tax (such as VAT), the taxable event does not range over a certain period, but on the contrary, takes place immediately. As a consequence, the legal rules in force at that specific moment in time are applicable.[17] The same applies for

---

9. Popelier, *supra* note 3, at p. 32. In the English-language literature this is called 'grandfathering'.
10. M. Dassesse, 'Retroactiviteit in het fiscaal recht – Een stand van zaken in België en in de Europese Gemeenschap', *T.F.R.* 2001, p. 879 ff., at p. 880; Tiberghien Advocaten, *Handboek voor fiscaal recht 2008* (Mechelen: Kluwer, 2008), at pp. 23-24.
11. J. Malherbe and P. Daenen, 'Retroactivity of domestic tax laws and tax judgments of the European Court of Justice. The Belgian perspective and the European context', in: *National report, Conference on Prohibition of tax retroactivity: national and community new tendencies*, Naples, 10 November 2009, p. 1 ff., at pp. 4-5.
12. Arbitragehof 15 September 1999, No. 99/99, Arbitragehof 16 November 2000, No. 115/2000 and Arbitragehof 18 April 2001, No. 45/2001, Arbitragehof 23 June 2004, No. 109/2004, all on http://www.const-court.be. In view of the principle of legal certainty this point of view has been the subject of criticism in the legal doctrine (Peeters, *supra* note 4, at p. 101, No. 34).
13. Cass. 14 March 2008, *Pas.*, 2008, No. 184; www.juridat.be.
14. Cass. 29 July 1998, *F.J.F.* 1998, No. 98/213; Cass. 11 September 2003, www.juridat.be.
15. O. Neirynck, 'Le principe de la non-rétroactivité des lois en matière fiscale', in: T. Afschrift et al., eds., *L'évolution des principes généraux du droit fiscal. 20e anniversaire de la maîtrise en gestion fiscale* (Brussel: Larcier, 2009), p. 139 ff., at pp. 144-145.
16. Inter alia, O. Bertin, 'Les lois rétroactives en matières d'impôt sur les revenus', *J.D.F.* 2001, p. 193 ff., at p. 194; A. Claes, 'Staat Cassatie meer toe dan het Arbitragehof?', (case note on Cass. 11 September 2003), *Fisc. Act.* 2003, vol. 4, p. 7 ff., at pp. 7-10.
17. Popelier, *supra* note 3, at pp. 84-85.

withholding tax, since the tax debt arises at the moment of the assignment or payment of the income on which the withholding tax is due.[18]

3.3.1.3. **Interpretative statutes**

Article 85 of the Belgian Constitution states that '*only the law can give an authentic interpretation of legislation*'.[19] An interpretative statute is a statute that provides such an authentic interpretation.[20]

For a recent example of an interpretative provision, reference can be made to Articles 12-14 of the Bill of 21 December 2009 containing tax and miscellaneous provisions.[21] This bill provides an interpretation of Article 275[3] ITC that concerns withholding tax on earned income. According to this article, certain research institutions are partially exempt from transferring the tax withheld on the earned income to the Treasury. The *ratio legis* of this provision was to stimulate scientific research in Belgium. It was, however, unclear whether or not the scientific institutes were under the obligation to reinvest the exempted funds. According to the Explanatory Statement of the amendment that inserted Articles 12-14, it has always been the intent of the legislator that the exempted funds would be used for additional investments in scientific research, and not to reduce the economic cost of the existing research. The bill adjusts the text of Article 275[3] ITC accordingly.

In Belgium the Constitutional Court originally gave a rather restrictive definition of interpretative statutes, accepting a statute as interpretative only if the original act from the beginning could reasonably not have been interpreted in any other way than in the meaning given to it by the interpretative statute.[22] Only in that case is the interpretative statute truly declaratory without adding something new. This, however, would deprive the interpretative statute of its purpose because if the original act could reasonably not have been interpreted in any other way, there would have been no need for any clarification. Since June 2006 the Constitutional Court has changed its position, however. It accepts a statute as interpretative if it gives to the original act a meaning which the lawgiver intended from the beginning and which reasonably could have been inferred from that act.[23] Thus, in clarifying an original act, interpretative statutes do add new content to the legal order. According to the Constitutional Court, an interpretative statute attributes to a legal provision the meaning the legislator had in mind at the time of its adoption.[24] The interpreted provision is deemed to always have had the meaning the authentic interpretation provides.[25] An interpretative statute does not give an unexpected turn to the meaning of the original act; it

---

18. Arbitragehof 23 June 2004, No. 109/2004; Arbitragehof 17 May 2006, No. 77/2006, both on www.const-court.be.
19. Article 133 of the Constitution provides *mutatis mutandis* the same for decrees.
20. P. Peeters, 'De fiscale beginselen van gelijkheid, legaliteit, rechtszekerheid en eenjarigheid in de rechtspraak van het Arbitragehof', *T.B.P.* 2005, vol. 4-5, p. 334 ff., at p. 347. In general, it is not considered problematic if a retroactive statute confirms the tax authorities' position, while some taxpayers have a defensible different view, to the extent the interpretative statute is not a covert plain retroactive statute.
21. Bill 21 December 2009 containing tax and miscellaneous provisions, *B.S.* 31 December 2009, Second edition. Articles 12-14 were inserted by an amendment of 9 December 2009, DOC 52, 2310/002.
22. Arbitragehof, 19 December 2002, No. 189/2002; 2 February 2005, No. 25/2005; 1 February 2006, No. 20/2006; 26 November 2009, No. 192/2009.
23. Arbitragehof, 21 June 2006, No. 102/2006, *B.S.* 5 July 2006.
24. Arbitragehof 19 December 2002, No. 189/2002, www.const-court.be; Arbitragehof 21 June 2006, No. 102/2006, *B.S.* 5 July 2006.
25. Arbitragehof 29 March 2000, No. 36/2000, www.const-court.be; P. van Orshoven, 'De kraai en de puid – De retroactieve wet in het licht van de beginselen van behoorlijke wetgeving', in: Jura Falconis, ed., *De retroactiviteit van rechtsregels* (Leuven: Jura Falconis Libri, 1998), p. 7 ff., at p. 12.

merely confirms an interpretation which could reasonably have been derived from the original act.

There is, however, a risk that the legislator will wrongfully use an interpretative law in order to grant actual retroactive effect to a legal rule, or even to influence the outcome of pending litigation.

The task of the Constitutional Court, therefore, consists in verifying whether the interpretative law really has an interpretative character. Otherwise, the alleged interpretative law may be recharacterized as purely retroactive. In the latter case, the retroactive effect can nevertheless be justified.[26]

From the case law of the Constitutional Court, four characterizations of interpretative laws can be deduced:

- Interpretative statutes are retroactive by nature: they apply as from the date the legal provision they interpret became operative;
- The characterization of a statute as interpretative cannot assign to the legislator the authority to circumvent the fundamental principle of non-retroactivity;
- Retroactivity of an interpretative statute may be justified if it gives to the original act a meaning which the lawgiver intended from the beginning and which reasonably could have been inferred from that act;
- In all other circumstances, the same restrictions as for plain retroactive statutes apply.

In conclusion, one can say that it does not make any difference whether or not the legislator considers a law to be 'interpretative': the examination by the Constitutional Court of the justification of the retroactive effect remains the same.[27]

3.3.1.4. **Validation statutes**

In Belgium it often happens that the legislator makes use of the technique of 'legislative validation'. This technique means that the legislator interferes by validating *post factum* irregular administrative acts. [28]

In this respect, the Constitutional Court gives evidence of a pragmatic approach.[29] An example in a tax case can illustrate this: a local tax regulation of 1988 was declared invalid by the Council of State in 1990 because irregularities occurred concerning the convocation of the Municipality Council. The issuing of a new local tax regulation with retroactive effect was not possible (Article 2 Civil Code). To prevent severe financial consequences for the municipality, the legislator validated in a law of 1991 the provisions of the local tax regulation of 1988. The Constitutional Court considered the retroactive effect of this statute to be justified since, on the one hand, the statute aimed at preventing severe financial consequences for the municipality and, on the other hand, the decision of the Council of State only concerned a matter of procedure.[30]

For a recent example, we can refer to two decisions of the Constitutional Court[31], concerning the Law of 24 July 2008.[32] This law validates several local tax regulations that

---

26. Malherbe and Daenen, *supra* note 11, at pp. 9-10. In this respect, we also refer to point 3.2.
27. P. Popelier, 'Interpretatieve wetten moeten interpreteren', (case note on Arbitragehof 19 December 2002), *R.W.* 2002, p. 1460 ff., at p. 1463.
28. Peeters, *supra* note 20, at pp. 348-350.
29. Arbitragehof 12 November 1992, No. 67/1992; Arbitragehof 21 December 1995, No. 87/95; Arbitragehof 13 July 2001, No. 98/2001, all on www.const-court.be.
30. Arbitragehof 12 November 1992, No. 67/1992, www.const-court.be.
31. Constitutional Court 26 November 2009, No. 186/2009; Constitutional Court 17 December 2009, No. 199/2009, both on www.const-court.be.
32. *B.S.* 8 August 2008.

were declared invalid by a decision of the Supreme Court.[33] Also in these cases the Constitutional Court decided that the severe financial consequences for the municipality can justify the retroactive effect of this statute.[34]

Such a legislative validation, however, cannot interfere with juridical decisions that have authority of *res judicata*.[35]

The difference with an 'interpretative statute' is that an interpretative statute is regarded as a confirmation of the interpretation which the legislator had in mind at the time of the adoption of the interpreted legal provision. A 'validation statute', on the other hand, validates retroactively a local administrative rule that has been declared invalid.

3.3.1.5. **Comparison moment**

In Belgium a distinction is made between the effective date of a legal rule, the date of entry into force and the date of publication. To determine whether or not a legal rule has retroactive effect, the date of entry into force generally serves as the point of reference.[36] According to the Constitutional Court, a legal rule is indeed considered retroactive when it is applicable to juridical relations that were already definitively completed before its date of entry into force.[37] Note that a law can never enter into force before the date of publication in the Belgian Official Gazette.[38] Unless stipulated otherwise, a law is deemed to enter into force ten days after publication.[39]

3.3.1.6. **Concept of retrospectivity**

In this respect, we refer to the observations made above under 1.1. A retrospective rule has an immediate effect, which implies that a new legal rule is both applicable to legal facts that occur after the date of entry into force of this new rule, as well as to legal consequences occurring after the date of entry into force, even though these consequences relate to legal facts that took place before this date.[40] A new legal rule is, for example, applicable to all corporate expenses that occur after the date of its entry into force, even though these expenses relate to an agreement that was concluded before this date.[41]

---

33. Cass. 14 March 2008, *T.F.R.* 2008, vol. 355, 108; J. Astaes, 'Aanvullende gemeentebelastingen op de personenbelasting moeten tijdig worden goedgekeurd', *Fisc. Act.* 2008, vol. 15, p. 4 ff., at pp. 4-6; L. vanHeeswijck, 'Wetgever komt gemeenten te hulp', Fiscale Kroniek, *De Standaard*, 3 July 2008; E. van de Velde, 'Retroactieve wet repareert retroactieve gemeentelijke belastingverordeningen', (case note on Cass. 14 March 2008), *T.Gem.* 2009, vol. 3, p. 202 ff., at pp. 202-203.
34. J. Astaes, 'Grondwettelijk Hof vernietigt reparatiewet aanvullende gemeentebelasting niet', *Fisc. Act.* 2009, vol. 42, p. 9 ff., at pp. 9-11.
35. Arbitragehof 9 February 2000, No. 17/2000; Arbitragehof 13 March 2002, No. 49/2002.
36. Popelier, *supra* note 3, at pp. 31-32; R. Ergec, 'La rétroactivité en droit fiscal', *R.G.F.* 1997, p. 4 ff., at p. 6.
37. Arbitragehof 22 November 1990, No. 36/90, www.const-court.be.
38. In accordance with Article 190 of the Constitution, a legal rule cannot have binding effect, unless it has been published in the manner described by the law.
39. For other legal rules, for example royal decrees, similar rules apply.
40. This wording can be found in the case law of both the Constitutional Court (e.g. Arbitragehof 22 December 1993, No. 88/93, www.const-court.be) and the Supreme Court (e.g. Cass. 22 February 1988, *Arr. Cass.* 1987-88, 808; Cass. 21 February 2003, *Pas.* 2003, I, No. 127).
41. Peeters, *supra* note 6, at p. 680.

3.3.1.7. Distinction between substantive and procedural statutes

a. With respect to the impact of a statute having immediate effect
In Belgium a distinction is made between substantive and procedural statutes. According to Article 3 of the Judicial Code, procedural rules are immediately applicable to pending proceedings, except in the event the relevant law provides differently.

b. Rules considered to be procedural rules
Rules concerning judicial organization, judicial competence and judicial procedure, as well as rules regarding evidence and the burden of proof, are considered procedural rules.[42]

Rules modifying the period of limitation are also procedural rules. If a period of limitation is still running, the rules are immediately applicable and the period will be extended or reduced accordingly. A limitation period that has already been terminated, however, cannot be influenced by new procedural rules.[43] In this respect reference is made to the observations made below under 3.3.3.2.

Finally, the rules concerning administrative sanctions are procedural rules as well. According to the ECtHR, such administrative sanctions can be of a criminal nature if certain conditions are satisfied.[44] This view has also explicitly been confirmed by the Belgian Supreme Court.[45] Under these circumstances, the criminal provisions regarding retroactivity have to be applied. In this respect, we refer to 3.3.2.1.

3.3.2. Ex ante evaluation of retroactivity

3.3.2.1. Constitutional limitations to retroactivity of tax statutes

The concept of non-retroactivity does not appear in the Belgian Constitution, but is laid down in Article 2 of the Civil Code, which is also applicable to tax statutes.[46] According to this provision, a law only provides for the future and does not have retroactive effect. As a result, it is explicitly prohibited to grant retroactive effect to any rule emanating from a legislative assembly[47] that is hierarchically lower than a law. In principle, nothing hinders a law from deviating from Article 2 of the Civil Code.[48] Tax law can indeed provide for retroactive effect, when it specifically does so as an exception to the Civil Code.[49] This is why, among some scholars, the question arose whether non-retroactivity was merely 'wishful thinking' or 'soft law'.[50]

This is, however, incorrect, since the Constitutional Court attributes constitutional value to the principle of non-retroactivity. This is also the general opinion in the literature.[51] In its case law, the Court applies the broader concept of legal certainty, from which the principle of non-retroactivity is derived. Since legal certainty is not explicitly embedded in

---

42. Popelier, *supra* note 3, at pp. 72-75.
43. Cass. 26 October 1994, *Pas.* 1994, I, 861; Cass. 20 September 1995, *Arr.Cass.* 1995, 803; Cass. 12 November 1996, *Arr Cass.* 1996, 1039.
44. ECtHR 24 February 1994, Bendenoun, *J.D.F.* 1994, 42; ECtHR 4 March 2004, Silvester's Horeca Service, *F.J.F.* 2004/157.
45. Cass. 25 May 1990, *F.J.F.* 99/126.
46. J.J. Couturier, B. Peeters and N. Plets, *Belgisch Belastingrecht*, 20th edition (Antwerpen: Maklu, 2013), at p. 50, No 28; G. van Fraeyenhoven and F. Leurquin-de Visscher, 'La rétroactivité et l'effet d'annonce en matière fiscale' in: X, ed., *Protection des droits fondamentaux du contribuable* (Brussel: Bruylant, 1993), p. 275 ff., at p. 275.
47. Please note that there are, in Belgium, several legislative assemblies on different political levels.
48. Cass. 11 September 2003, www.juridat.be.
49. Cass. 24 February 1977, *Pas.* 1977, I, 672.
50. L.P. Suetens, 'De retroactiviteit van wetten, decreten en ordonnanties', *T.F.R.* 1993, p. 218 ff., at p. 219.
51. Neirynck, *supra* note 15, at pp. 140-141; Ergec, *supra* note 36, at p. 4.

the Constitution either, the Constitutional Court bases its decisions on the violation of Articles 10 and 11 of the Belgian Constitution, which express the principle of equality. In other words, in the event of retroactivity of a law undermining legal certainty, the Constitutional Court will, in principle, decide that the law constitutes a breach of Articles 10 and 11 of the Constitution.[52] However, not every retroactive statute constitutes an infringement of the principle of legal certainty.[53] Moreover, as will be discussed below, retroactivity can be justified if certain conditions are satisfied.

The Supreme Court has adopted a different approach regarding the existence of a principle of non-retroactivity. The Supreme Court considers the non-retroactivity of laws to be a general principle of law that has been concretely embodied, *inter alia*, in Article 2 of the Civil Code.[54] In a decision of 2005, the Court held that the non-retroactivity founded on the principle of legal certainty, however, does not have constitutional value.[55] Yet this decision is criticized in literature.[56] It should also be noted that, in its annual report of 2002-2003, the Supreme Court explicitly mentioned the constitutional value of the principle of legal certainty.

Article 2 of the Civil Code is also applicable to royal decrees and other regulations emanating from the executive. Article 108 of the Law of 4 August 1986 stipulates that decrees implementing tax laws can only apply to future events and, hence, that such decrees have no retroactive effect except in the event the relevant law provides for an explicit deviation.

Finally, it should be noted that retroactivity of more criminal tax provisions is absolutely prohibited.[57] If, however, the penalty at the time of the judgment is less severe than at the time of the offence, the 'lex mitior' has to be applied.[58] As mentioned above, these rules are also applicable to administrative penalties of a criminal nature.

3.3.2.2. **Transition policy of government**

To our knowledge, the Belgian government does not have a specific policy concerning transition in the field of tax statutes. The Flemish region did, however, play a pioneering role in developing a general legislative policy concerning the quality of tax legislation.[59] At the Walloon side, as well as at the Federal level, the emphasis is instead on administrative simplification.

An extensive Flemish circular letter of 17 July 2009[60], addressed to all staff members of the Flemish government, looks into different aspects of legislative technique. Although a

---

52. P. Peeters 'De beginselen van gelijkheid, legaliteit, rechtszekerheid en eenjarigheid in de rechtspraak van het Arbitragehof', *T.B.P.* 2005, vol. 4-5, p. 334 ff., at pp. 346-347; Arbitragehof 5 July 1990, No. 25/90; Arbitragehof 22 November 1990, No. 36/90; Arbitragehof 11 February 1993, No. 10/93; Arbitragehof 6 November 1997, No. 64/97, (all on www.const-court.be).
53. Arbitragehof 13 July 2001, No. 98/2001; Arbitragehof 15 September 1999, No. 97/99. All on www.const-court.be.
54. Cass. 22 October 1970, *Pas.* 1971, I, 144; Cass. 27 March 1992, www.juridat.be; Cass. 22 January 1996, *Pas.* 1997, I, 44.
55. Cass. 17 November 2005, *F.J.F.* 2006, 2006/153.
56. B. Peeters, 'La relation en matière fiscale entre le principe de sécurité juridique et le principe de légalité: un processus d'Echternach?' in: *Liber Amicorum Jacques Autenne* (Brussel: Bruylant, 2010), at pp. 41-65; P. Popelier, 'Bedenkingen bij de visie van het Hof van Cassatie op het rechtszekerheidsbeginsel en het verbod van terugwerkende kracht als algemene rechtsbeginselen', (case note on Cass. 17 November 2005), *R.W.* 2005-06, p. 1469 ff., at p. 1470.
57. Article 2 of the Penal Code, Article 7 of the European Convention on Human Rights and Article 15 of the International Covenant on Civil and Political Rights.
58. Article 2, §2 of the Penal Code. It is uncertain whether this rule can also be applied to purely administrative sanctions.
59. Viz. inter alia P. van Humbeeck, 'Betere Vlaamse regelgeving: voorstellen voor een slagvaardig beleid', *T.v.W.* 2004, p. 218 ff., at pp. 218-233 and www.vlaanderen.be/wetsmatiging.
60. www.wetsmatiging.be.

circular letter is, strictly speaking, not legally binding, it does give important recommendations worthy of consideration. Among other issues, this circular letter recapitulates the general principles regarding the application *ratione temporis* of Flemish legal rules. The circular letter states inter alia that a legal rule has, in principle, immediate effect and that retroactive effect is only granted in exceptional circumstances. Reference is also made to the case law of the Constitutional Court. More importantly, the circular letter also states that retroactive effect of decrees might be justified if the legal rule grants certain advantages. The circular letter also examines the necessity of transitional provisions: if the application of new rules is not sufficiently predictable for the parties concerned, it can be expedient for the old rules to remain applicable to these situations. In many cases the preservation of vested rights needs to be guaranteed. As mentioned above, none of these recommendations specifically concern tax statutes.

3.3.2.3. **Ex ante control by an independent body**

a. Advisory bodies such as the Council of State

In Belgium the legislation department of the Belgian Council of State gives judicial, linguistic and legislative advice about draft decrees, preliminary bills and proposals of law, decrees or ordinances as well as amendments concerning these. This advice does not, however, have binding force.

Apart from the Council of State, some consultative committees also play an important role in the Belgian decision-making procedure, during both the formal and the informal preparatory phase.[61] Depending on the subject matter, a preliminary bill of law has to be proposed to the advisory committees or has to be discussed with representatives of the trade unions. For tax matters, however, there are in general no specific formal advisory or consultative obligations.

b. Rules to review retroactivity

The website of the Council of State provides information regarding legislative technique. A manual with recommendations in this respect can be downloaded from the website.[62] This manual also contains observations regarding retroactivity. Yet these observations do not specifically concern tax statutes, but are of a general nature.

The manual states that, in general, legislative and administrative rules do not have retroactive effect. For retroactivity to be justified, certain conditions have to be met. For legislative rules, the manual refers to the case law of the Constitutional Court and states that a retroactive measure can only be justified '*when it is indispensable for achieving a goal of public interest, such as the well-functioning or continuation of public service*'. For administrative rules, reference is made to the advice of the Council of State itself: retroactive effect of administrative rules can only be justified in exceptional circumstances, such as the continuation of public service or regularization of a juridical or factual situation, and insofar as the requirements concerning legal certainty and individual rights are preserved.[63]

c. Rules to review favourable retroactivity

We are not aware of any specific policy in this respect. See also our observations made under 3.3.2.1. and 3.3.3.3.

---

61. W. deWachter, *De mythe van de parlementaire democratie* (Leuven: Acco, 2001), at pp. 145-171.
62. www.raadvst-consetat.be (tab 'wetgevingstechniek').
63. R.v.St. – afdeling wetgeving, *Beginselen van de wetgevingstechniek – Handleiding voor het opstellen van wetgevende en reglementaire teksten*, at p. 127.

3.3.3. Use of retroactivity in legislative practice

3.3.3.1. 'Legislating by press release'

During the last two decades, the Belgian government has increasingly made use of this technique, whereby new tax legislation may enter into force as from the date upon which the decision to enact the new legislation was published in the Belgian Official Gazette[64], or even as from the date of the press release following the session of the Council of Ministers that has decided to propose a certain tax measure to be voted by the parliament.[65]

It may even happen that the retroactive period reaches further back in time than the date of the press release.[66]

This technique is used in cases where the government wants to prevent an 'announcement effect', i.e. the situation where, as soon as they become aware of future changes in legislation, taxpayers take certain actions that undermine the effect of this legislation.[67]

The Council of State, as well as certain scholars, considers it admissible that a new statute is applicable as from the date of announcement in the Belgian Official Gazette.[68] An announcement with retroactive effect of its own is, however, one bridge too far for the Council of State, since the whole purpose of the announcement is to justify the retroactive effect of a future legal rule.[69]

The Constitutional Court adopted an even stricter position in its judgment of 23 June 2004.[70] At first, the Constitutional Court acknowledged that such an announcement corrects, to a certain extent, the unpredictability of a retroactive measure. Furthermore, the Court admitted that the public interest could demand that a tax measure should have effect as from the day the draft was made public, to reduce the risk that taxpayers would anticipate the effects of that measure. Notwithstanding the apparent acceptance of such announcements, the Court is of the opinion that an informative announcement published in the Belgian Official Gazette cannot, by its nature, correct the legal uncertainty created by the retroactive effect, and therefore, cannot justify the retroactive nature of a legal provision. This case law seems to condemn the use of the announcement-technique as a sole justification for the retroactive effect of a tax provision.[71]

Furthermore, certain scholars are of the opinion that the technique of the announcement is not compatible with the principle of non-retroactivity.[72]

---

64. For examples, viz. *B.S.* 7 July 1993, *B.S.* 19 May 1995 and *B.S.* 23 April 2002.
65. P.A.A. vanHoute, *Belgium in International Tax Planning* (Amsterdam: IBFD publications, 2008), at p. 66; W. vandenBerghe, *Van ontbinding tot fusie – Fiscale aspecten* (Mechelen: Kluwer, 2007), at p. 173.
66. First example: Wet 20 March 1996, *B.S.* 7 May 1996. The announcement was published on 19 May 1995, and the act was granted retroactive effect as from 7 April 1995. Second example: Wet 24 December 2002, *B.S.* 31 December 2002. The announcement was published on 23 April 2002, and the act was granted retroactive effect as from 1 January 2002. Since it concerned withholding tax, the act could not be characterized as 'retrospective' in the sense of question 2.
67. *Parl. St.* Kamer, DOC 50, 1818/006, pp. 105 and 116.
68. Adv. R.v.St. 9 november 1990, *Parl. St.* Kamer, DOC 48, 1366/1, 44-45; Adv. R.v.St., *Parl. St.* Kamer, DOC 50, 1918/001, 106-108; Suetens, *supra* note 50, at p. 222.
69. Adv. R.v.St., *Parl. St.* Kamer, DOC 50, 1918/001, 106-108.
70. Arbitragehof, no. 109/2004, 23 June 2004, *B.S.* 13 July 2004.
71. Neirynck, *supra* note 15, at pp. 158-161.
72. Ergec, *supra* note 36, at pp. 8-9; B. Bouckaert and W. Niemegeers, 'De verboden fiscale vrucht blijft aanlokkelijk!', *A.F.T.* 2003, p. 209 ff., at p. 218.

According to other opinions, the compatibility of the announcement with the principle of non-retroactivity must be analysed case by case.[73] If certain conditions are met, the announcement does not undermine the legitimate expectations of the taxpayers as a result of which the technique of the announcement might be able to justify the retroactive effect of a legal measure. These conditions are the following:

> '– The announcement has to emanate from the government itself;
> – The government needs to have the intention of influencing the behaviour of the taxpayers;
> – The announcement has to be properly announced;
> – The announcement has to indicate clearly to what extent the future legal rule will influence the former legislation;
> – It has to be sufficiently convincing that the draft measure will be accepted by the final decision-making body. In this respect, there has to be an adequate link between the body making the announcement and the decision-making body.'[74]

Sometimes the Belgian legislator also grants retroactive effect in cases in which the instrument of 'legislating by release' is not used. This happens, for example, in cases where the legislator wrongfully characterizes statutes that are actually retroactive as interpretative statutes. Another example is the legislative validation statutes.

3.3.3.2. **Pending legal proceedings**

In principle, pending legal proceedings are excluded from the scope of a new substantive statute. Occasionally, however, it does happen that retroactive substantive statutes have an influence on pending legal proceedings. In cases where the retroactivity of an act substantially influences the outcome of pending cases or prevents the courts from handling certain issues, the Constitutional Court has adopted a strict approach. Either 'exceptional circumstances' or 'compelling motives of public interest' are required to justify the retroactive effect of such a statute.[75] In a recent decision regarding a regional tax, the Court considered such exceptional circumstances to exist.[76]

Another important case relating to the intervention of the legislator in pending litigation was case 177/2005.[77] Article 145 RD/ITC provides that the limitation period for direct tax amounts to a five-year period as from the date they became due. After this five-year period, any tax debtor who has not yet settled his debts with regard to direct taxes can consider himself discharged and the Tax Collector will no longer be entitled to institute legal proceedings for recovery of contributions that have not yet been paid, unless the limitation period has been interrupted or suspended. It was generally accepted that a summons, i.e. a bailiff's deed by which the debtor receives a payment order under an enforceable title, interrupted the limitation period according to Article 2244 of the Civil Code. However, on

---

73. J. Kirkpatrick, 'La non-rétroactivité de la loi en matière d'impôts sur les revenus et la sécurité juridique depuis l'arrêt de la Cour d'Arbitrage n° 109/2004', in: X, ed., *Liber Amicorum Jacques Malherbe* (Brussel: Bruylant, 2006), p. 653 ff., at pp. 667-669; M. Dasesse and P. Minne, *Droit fiscal – Principes généraux et impôts sur les revenus* (Brussel: Bruylant, 2001), at p. 63.
74. Peeters, *supra* note 4, at p. 94 and the references in footnote 38.
75. Peeters, *supra* note 20, at p. 347; Grondwettelijk Hof 4 March 2008, No. 41/2008; Arbitragehof 30 November 2004, No. 30/2004, Arbitragehof 19 December 2002, No. 189/2002, (all on www.const-court.be).
76. Grondwettelijk Hof 4 March 2008, No. 41/2008, www.const-court.be.
77. Arbitragehof 7 December 2005, No. 177/2005, *B.S.* 28 December 2005. This case is extensively expounded in L. de Broeck and V. Hovine, 'De fiscus als slechte verliezer: de ongelijke strijd tegen verjaarde betwiste belastingschulden', in: L. Maes, et al., eds., *Fiscaal Praktijkboek 2006-2007 – Directe belastingen* (Mechelen: Kluwer, 2007), p. 53 ff., at pp. 53-71.

10 October 2002 the Supreme Court decided that the issue of a summons to pay did not interrupt the period of limitation in case the tax had been contested.[78] According to this jurisprudence, summons to pay only have an interrupting effect on the amount of the tax indisputably due. Consequently, the tax authorities were confronted with tax debts for which the limitation period had not been interrupted, even though summons to pay had been issued.

A new law of 22 December 2003 substantially modified the rules relating to the limitation period in income tax matters. The new provisions were only applicable to limitations that were not yet effective. As a result, the tax claims for which the limitation period had already expired were at risk of being permanently lost. In order to remedy this disastrous situation – at least from the point of view of the government – another act was passed. On 9 July 2004 an interpretative statute was introduced that stated the following: '*the summons must be interpreted as also constituting an act of interruption of the limitation period within the meaning of Article 2244 of the Civil Code, even when the contested tax debt has no certain or liquid nature*'.[79] According to the Constitutional Court, this provision cannot be considered to be interpretative, but should be considered retroactive, aiming at influencing the outcome of litigation. The Court, however, found that in this case the retroactive effect could be justified. On the one hand, the Court accepted the existence of 'exceptional circumstances': the legislator intended to neutralize the devastating effect of the Supreme Court's decision. On the other hand, the Court accepted as 'imperious motives of public interest' the fact that the rights of the Treasury had to be protected in respect of the contested tax debts.[80]

3.3.3.3. **Favourable retroactivity**

We are not aware of any cases where a retroactive effect was granted to such a favourable tax statute.

It should, however, be noted that – although administrative decisions, i.e. acts with an individual scope cannot, in principle, be applied retroactively – the Council of State decided that *administrative decisions* are considered to have retroactive effect if they are favourable to the relevant individual (e.g. the introduction of a fiscal exemption that is more favourable than the former exemption).[81]

3.3.4. **Ex-post evaluation of retroactivity (in case law)**

3.3.4.1. **Testing against the Constitution and legal principles**

In Belgium only the Constitutional Court may test whether laws, decrees or ordinances are compatible with the Constitution. As mentioned above, the Belgian Constitution does not include a provision that imposes limitations to the retroactivity of statutes. In its case law, the Constitutional Court applies the broader concept of legal certainty from which the principle of non-retroactivity is derived. Since legal certainty is not explicitly embedded in the Constitution either, the Constitutional Court founds its decisions on the violation of Articles 10 and 11 of the Belgian Constitution, which provide for the principle of equality.

Only the Constitutional Court has the authority to acknowledge general principles of law and to test laws, decrees and ordinances against these principles. In the past, the Supreme Court has also acknowledged general principles of law, but since the establish-

78. Cass. 10 October 2002, www.juridat.be.
79. Program Law 9 July 2004, B.S. 15 July 2004.
80. The preceding analysis can be found in Malherbe and Daenen, *supra* note 11, at pp. 10-11.
81. R.v.St. 30 April 1992, No. 39.262, www.raadvst-consetat.be.

ment of a separate Constitutional Court, this is no longer admissible.[82] This applies all the more for hierarchically lower courts. It would indeed be rather inconsistent if regular courts were competent to test laws, decrees and ordinances against general principles of law, while it is explicitly prohibited for them to test these legal rules against the Constitution itself.[83]

3.3.4.2. **Examination method**

As mentioned above, the Constitutional Court does not consider every retroactive statute to constitute an infringement of the principle of legal certainty.[84]

First of all, it is possible that retroactive provisions simply confirm legal rules that had been published earlier. For example, if a new act repeats and confirms provisions of an existing royal decree, the new act only consolidates an existing situation. The retroactive effect of such a provision does not constitute a breach of the principle of legal certainty.[85]

Secondly, the Constitutional Court holds the opinion that retroactivity can be justified in certain circumstances. Justification is possible when the retroactive effect of a legal rule is indispensable to achieve a goal of public interest, such as the well-functioning or continuation of public services.[86] Although in many cases reference is made to the impact on public finances, this justification is generally rejected.[87] The Constitutional Court only accepts this justification when it is accompanied by other persuasive considerations.[88] Whether grounds for justification are present is examined on a casuistic basis.

As mentioned above, the Court will be more reluctant to accept a justification when the retroactive legal rule has an influence on the outcome of pending legal proceedings. In this respect, we refer to the observations made above under 3.3.3.2.

3.3.4.3. **Testing against Article 1 of the First Protocol ECHR**

All Belgian courts have the authority to test whether (tax) statutes are compatible with treaty provisions that have direct effect. However, as from 10 August 2009 onwards, judges are obliged to ask the Constitutional Court to give a preliminary ruling if a law, decree or ordinance potentially violates a basic right that is totally or partially guaranteed both in the Belgian Constitution and in a European or other treaty.[89] Since both Article 16 of the Belgian Constitution and Article 1 of the First Protocol ECHR deal with the protection of property, the Constitutional Court should always be asked for a preliminary ruling in this respect.

In case 177/2005[90], the Constitutional Court tested the compatibility of a retroactive tax statute with Article 1 of the First Protocol ECHR. For the background of this case, we refer to our observations above under 3.2. The Constitutional Court decided, however, that there was no disproportionate interference with the right of property. First of all, the taxpayers

---

82. In spite of this, the Supreme Court still seems to consider itself competent to determine whether or not a general principle has 'constitutional value'. Viz. Cass. 17 November 2005, *F.J.F.* 2006, 2006/153.
83. J. Vandelanotte and G. Goedertier, *Overzicht Publiekrecht* (Brugge: Die Keure, 2007), at pp. 169-175.
84. As mentioned above, the Constitutional Court combines the principle of legal certainty with the principle of equality as laid down in Article 10 and 11 of the Constitution.
85. Arbitragehof 15 September 1999, No. 97/99; Arbitragehof 21 July 2001, No. 98/2001, both on www.const-court.be.
86. Arbitragehof 20 May 998, No. 49/2008, www.const-court.be.
87. Neirynck, *supra* note 15, at p. 156.
88. O. Bertin, 'Les lois rétroactives en matière d'impôt sur les revenus', *J.D.F.* 2001, p. 193 ff., at p. 215.
89. Article 26, §4 of the Extraordinary Law of 6 January 1989, as inserted by Article 2 of the Extraordinary Law of 12 July 2009, *B.S.* 31 July 2009; B. Peeters, *Belgisch Belastingrecht in hoofdlijnen* (Antwerpen: Maklu, 2009), at p. 24; P. Popelier, 'Prejudiciële vragen bij samenloop van grondrechten. Prioriteit voor bescherming van grondrechten of voor bescherming van de wet?', *R.W.* 2009-2010, vol. 2, p. 50 ff., at pp. 50-62.
90. Arbitragehof 7 December 2005, No. 177/2005, *B.S.* 28 December 2005.

did not obtain a claim against the State that equalized the amount of the contested tax debt. Secondly, even under the assumptions that the period of limitation had expired and that the tax payer had a property right to the expired debt, the interference of the legislator could be justified based on the second paragraph of Article 1 of the First Protocol ECHR. The criticized measure was indeed considered to be in accordance with the public interest and indispensable in securing the payment of taxes.

3.3.4.4. **Examination method for testing against the principle of legal certainty**

Concerning Acts of Parliament, we refer to our observations above under 3.3.4.1.

Since the principle of non-retroactivity is embedded in Article 2 of the Belgian Civil Code and Article 108 of the Law of 4 August 1986, there is no need for courts to test subordinate legislation against the principle of legal certainty. According to Article 159 of the Constitution, judges are obliged to disregard subordinate legislation that interferes with laws, decrees and ordinances. As a consequence, if subordinate legislation interferes with Article 2 C.C. or Article 108 of the Law of 4 August 1986, it will be set aside by the judge.

The Constitutional Court has ruled several times that the 'non-retroactivity of laws is a safeguard against legal uncertainty'.[91] This is the reason why retroactive applications can only be justified in specific circumstances. The fact that retroactive applications might raise further questions about legitimacy and validity is not explicitly taken into consideration.

3.3.5. **Retroactivity of case law**

3.3.5.1. **Temporal effect of judicial change of course**

Older case law and literature held on to the principle that judgments necessarily have a declaratory character, pursuant to which case law was deemed to always have a retroactive effect.[92] This declaratory character is based on the theory that judges do not create, but merely determine and apply the prevailing law.[93] As has been demonstrated extensively by the Dutch author Haazen, this theory currently tends to have been superseded.[94]

Furthermore, in the Belgian literature, this view has been strongly criticized. Certain authors argue strongly in favour of some sort of judicial transitional rule.[95]

It should be noted that both the Constitutional Court and the Council of State do have the authority to determine and limit the temporal effect of their decisions that nullify a legal rule '*erga omnes*'.[96]

---

91. Arbitragehof 2 February 2005, No. 25/2005; Arbitragehof 24 November 2004, No. 193/2004; Arbitragehof 19 December 2002, No. 189/2002, all on www.const-court.be.
92. Bergen 23 April 1987, *J.L.M.B.* 1987, 1249; Rb. Gent 10 September 1987, *T. Not.* 1988, 91;Rb. Luik 2 April 1990, *J.L.M.B.* 1990, 1201; N. Coipel, 'Conflit transitoire international, régime matrimonial legal et conflit moble', (case note on Cass. 9 September 1993), *Rev. Trim. Dr. Fam.* 1994, p. 80 ff., at p. 486.
93. C. Berx, *Rechtsbescherming van de burger tegen de overheid* (Antwerpen: Intersentia, 2000), at pp. 338-342.
94. O.A. Haazen, *Algemeen deel van het rechterlijk overgangsrecht* (Deventer: Kluwer, 2001), at p. 699. For a review: *viz. N.T.E.R.* 2003, vol. 7, at pp. 408-411.
95. M. Adams, 'De retroactieve werking van wijzigingen in de rechtspraak. Naar een systeem van rechterlijk overgangsrecht?', in: X, ed., *De retroactiviteit van rechtsregels* (Leuven: Jura Falconis Libri, 1998), p. 23 ff., at pp. 23-38; Berx, *supra* note 93, at pp. 338-342; N. Geelhand, 'Over zekerheid, rechtszekerheid en vertrouwensleer in het huwelijksvermogensrecht', *T.P.R.* 1989, p. 923 ff., at pp. 984-985.
96. Article 8 of the Extraordinary Law on the Constitutional Court and Article 14*ter* of the Coordinated Laws on the Council of State. The Constitutional Court does not have this authority with respect to preliminary rulings.

The law does not, however, grant the Supreme Court this authority. In a decision of 2005 the Constitutional Court refers explicitly to the problematic nature of the fact that the Supreme Court is not entitled to limit the temporal effect of its decisions.[97]

In a recent decision the Supreme Court obliquely dealt with this matter for the first time and seems to have opened the door for a potential temporal modulation of its case law.[98] Although this decision did not concern its own jurisprudence but, on the contrary, the preliminary rulings of the Constitutional Court, it can be argued that this decision has general scope and is also applicable to its own case law.[99] The Supreme Court seems an advocate of the establishment of a broader juridical transitional law.[100]

Please note that none of the above specifically concerns tax regulations. The consequences for the government of a (retroactive) judgment of the Supreme Court concerning tax regulations is, however, *de facto* limited, as a notice of objection against a tax assessment can only be lodged within six months after the date the assessment was sent out.[101] Apart from this, Article 376 ITC provides for a five-year period in which to claim an *ex officio* relief of overtaxation emerging from new documents or facts. According to the second paragraph of this article, changes in jurisprudence are not regarded as a new fact in this respect. Despite this, the Constitutional Court has ruled several times that its decisions indeed qualify as a new fact.[102] This has been explicitly confirmed in an administrative circular, both for *erga omnes* decisions and preliminary rulings.[103] This administrative divergence should, however, be interpreted in a restrictive manner and cannot, therefore, be considered applicable to decisions of the Supreme Court.

3.3.6. **Views in the literature**

3.3.6.1. **Opinions regarding retroactivity**

As already mentioned, it may be said that the general view in the Belgian tax literature corresponds, to a large extent, to the case law on retroactivity.

3.3.6.2. **Debate on legal and economic view of transitional law**

To our knowledge, the legal and economic view has provoked very little debate in Belgium. In the (Belgian) literature, the legal and economic view regarding fiscal retroactivity does not receive ample treatment.

---

97. Arbitragehof No. 177/2005, 7 December 2005, *B.S.* 28 December 2005; P. Popelier, 'Het Arbitragehof over interpretatieve en retroactieve wetten in het belastingrecht en de problematiek van rechterlijk overgangsrecht', (case note on Arbitragehof No. 177/2005), *R.W.* 2005-06, No. 32, p. 1256 ff., at p. 1259.
98. Cass. 20 December 2007, www.juridat.be.
99. E. Dirix, 'Rechterlijk overgangsrecht', *R.W.* 2008-09, p. 1754 ff., at pp. 1757-1758.
100. P. Popelier, 'Rechterlijk overgangsrecht revisited. Over een juridisch vacuüm, een prejudicieel arrest en de werking van rechterlijke uitspraken in de tijd', (case note on Cass. 20 December 2007), *R.W.* 2007-08, p. 1370 ff., at p. 1373.
101. Article 371 ITC.
102. Constitutional Court 8 November 2006, no. 160/2006, www.const-court.be; Constitutional Court, 8 March 2005, no. 54/2005, www.const-court.be; K. Gheysen, 'Het grondwettelijk Hof stelt grenzen aan de uitsluiting van 'nieuwe rechtsmiddelen of wijzigingen van de jurisprudentie' als grond voor de procedure van ambtshalve ontheffing', *T.F.R.* 2008, vol. 334, p. 85 ff., at pp. 85-88.
103. Circ. RH.862/536.019, 4 May 2001, *Bull. Bel.* 2001, No. 816, 1255. It can be argued that the same is valid for decisions of the European Court of Justice. Viz. M. Isenbaert, 'Tempus fugit: de werking in de tijd van een arrest van het Hof van Justitie inzake directe belastingen', *T.F.R.* 2009, vol. 358, p. 243 ff., at p. 255.

A contribution of Kaplow himself can be found in the 'Encyclopedia of Law and Economics' by Bouckaert and De Geest.[104] This contribution, however, has a rather general scope and does not discuss the Belgian repercussions of Kaplow's theory.

Furthermore, different legal and economic views on fiscal retroactivity are discussed briefly in the Liber Amicorum J.J. Couturier. However, the conclusion is that each one of these views only clarifies one single aspect of the problem.

For instance, the view arguing that changes in tax law should have retroactive effect because that would result in more efficient law-making is founded on the distributive function of taxation. This argumentation is only valid when the distributive function of a tax rule prevails. However, this is not always the case. In this respect, we can refer to the Belgian rules that provide for an increase of tax in case no advance payments are made. Clearly the function of this rule is not of a distributive nature. The goal of this rule is to encourage certain taxpayers to pay the tax they owe during the tax period by means of advance payments.[105]

104. L. Kaplow, 'General characteristics of rules', in: B. Bouckaert and. G. de Geest. eds., *Encyclopedia of Law and Economics*, Vol. 5 (Cheltenham: Edward Elgar, 2000), at pp. 502-528.
105. B. Peeters, *supra* note 4, at pp. 95-100.

3.4.
Canada

Geoffrey Loomer

3.4.1. Introduction

In Canada, like other countries, tax legislation is always changing. Much of the resulting complexity derives from transitional application of enactments: (a) changes to tax legislation may be made effective immediately; (b) others may be given effect from some future date, allowing taxpayers time to adjust their expectations and affairs; (c) historic benefits that are being abolished may be 'grandfathered' for taxpayers who continue to meet specific requirements; and (d) other changes may be made effective in the past, deeming the law to have been something other than what it was. The last of these temporal categories – referred to in Canada as 'retroactive' legislation – is frequently seen in Canadian tax law.

It should be noted at the outset that Canada has a federal constitution with tax jurisdiction divided between the federal and provincial governments.[1] The most significant pieces of legislation are the federal *Income Tax Act* ('*ITA*'),[2] which imposes an annual income tax on individuals and corporations, and the federal *Excise Tax Act*,[3] Part IX of which imposes the goods and services tax. The present discussion focuses on the federal legislative process with respect to the *ITA*, although most of the comments on the use of retroactive tax legislation apply equally to other federal tax legislation and provincial tax legislation.

3.4.2. Terminology

3.4.2.1. Distinction between 'retroactivity' and 'retrospectivity'

Until the 1990s there was confusion in Canada regarding the proper use of the terms 'retroactive' and 'retrospective'. Retrospective has traditionally been the term of choice for describing antedated laws in the legal discourse of the United Kingdom.[4] Commonwealth jurisdictions, including Canada, followed the British tradition in favouring the term 'retrospective'. This is evident in one of the leading cases on interpreting and applying 'retrospective' legislation, *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*,[5] where the Supreme Court of Canada employed 'retrospective' throughout its analysis. It was possibly the influence of American and French legal systems that led to the subsequent adoption in

1. *Constitution Act, 1867* (U.K.), 30 & 31 Vic., c. 3, ss. 91–92.
2. R.S.C. 1985, c. 1 (5th Supp.).
3. R.S.C. 1985, c. E-15.
4. *West v. Gwynne* [1911] 2 Ch. 1 (CA) at 12; F.A. Bennion, *Statutory Interpretation*, 4th ed. (London: Butterworths, 2002), at pp. 265–74.
5. [1977] 1 S.C.R. 271.

Canada of the term 'retroactive', with most judges and lawyers (until recently) treating the terms as interchangeable.[6]

Fortunately, the modern approach in Canadian legal discourse is to treat retroactivity and retrospectivity as distinct concepts. A statute is considered retroactive when it *acts* in the past – being deemed to have come into force prior to its enactment – while it is described as retrospective when it merely *looks* to the past – changing the future legal consequences of transactions or events that have already happened. Both categories of legal change are distinguished from enactments that have immediate effect on current rights, which are considered to fall into a separate category. This nomenclature was suggested by a number of legal scholars writing about principles of statutory interpretation.[7] It was subsequently adopted by the Supreme Court of Canada in non-tax cases[8] and has been applied in tax cases.[9]

Thus, in Canada it is reasonably clear that the adjective 'retroactive' is restricted to legislative amendments that, as explained in *Gustavson Drilling*, 'reach into the past and declare that the law or the rights of parties as of an earlier date shall be taken to be something other than they were as of that earlier date'.[10]

3.4.2.2. **Conceptual variations**

a. In general

One can identify three subcategories of retroactive legislation, at least in the context of income tax legislation. The three subcategories suggested here are probably best seen as areas on the spectrum of retroactivity, from least to most objectionable; there is no formal distinction in Canadian law as to the analysis or evaluation of legislation falling into the different subcategories.

It is helpful to explain briefly how taxes become law in Canada. Normal practice is for the Minister of Finance to introduce proposed federal tax changes in the presentation of the annual Budget, typically in February or March, although some proposals are announced via press releases or draft legislation outside of the budget process. It is customary for the Department of Finance to produce a document known as a 'notice of ways and means motion', describing the tax changes that have been proposed. A bill amending the relevant tax statute is then introduced in the House of Commons and, in accordance with the normal law-making process, becomes law only when it has passed through the House of Commons and Senate and has been given Royal Assent. If the government has a majority in the House of Commons, there is no uncertainty as to the passing of a tax bill. The default rule is that new, amending or repealing legislation (technically, an 'enactment') comes into force upon Royal Assent.[11] This rule is virtually always overridden in tax enactments, where a specific commencement date is expressed for each change. The prescribed date may be before or

6. E.g. *Brosseau v. Alberta Securities Commission* [1989] 1 S.C.R. 301; D.J. Sherbaniuk, 'Retrospectivity in Canadian Tax Legislation' in: *1983 Conference Report* (Toronto: Canadian Tax Foundation, 1984), at p. 727. Cf. E. Edinger, 'Retrospectivity in Law', 29 *U.B.C. Law Rev.* (1995), at p. 5.
7. E.A. Driedger, 'Statutes: Retroactive Retrospective Reflections', 56 *Canadian Bar Rev.* (1978), at p. 264; R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002), at pp. 542–50; P-A. Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Toronto: Carswell, 2000), at pp. 133–36.
8. *Benner v. Canada (Secretary of State)* [1997] 1 S.C.R. 358, paras. 39–40; *British Columbia v. Imperial Tobacco Canada Ltd.* [2005] 2 S.C.R. 473, 2005 SCC 49, paras. 69–72.
9. *Canada Trustco Mortgage Co. v. Canada* [2005] 2 S.C.R. 601, 2005 SCC 54, para. 7; *Kingstreet Investments Ltd. v. New Brunswick (Finance)* [2007] 1 S.C.R. 3, 2007 SCC 1, paras. 12, 25.
10. *Supra* note 5, at p. 279. [As was customary at the time, Dickson J. used the term 'retrospective'.]
11. *Interpretation Act*, R.S.C. 1985, c. I-21, s. 5.

after Royal Assent. In the latter case, the commencement date is proclaimed by the executive branch of government.

The first subcategory of retroactive income tax legislation is that which is made effective from the beginning of the current tax year. One view would be that this is not retroactivity at all, because income tax is imposed on an annual basis. The Canadian experience is that measures made effective from the beginning of the tax year tend to involve annual concepts, like income thresholds and personal tax credits, rather than affecting transactions that occur at a moment in time. For example, the 2009 Budget increased the personal income tax brackets for individuals, effective for the 2009 tax year and later years.[12] It also enhanced the small business deduction, which reduces the federal corporate income tax rate applied to the first CAD 400,000 of qualifying active business income of a Canadian-controlled private corporation, by increasing the income threshold to CAD 500,000, effective 1 January 2009.[13] There is a paucity of analysis of this kind of 'retroactivity' in Canada, presumably because it happens regularly and is considered unobjectionable.

Second, legislative changes may be made effective in respect of transactions or events occurring from the date of the Budget announcement, press release, or other Ministerial announcement. This can occur whether the announcement was made earlier in the same year or in a preceding year. The period between legislative proposal and enactment may be lengthy, sometimes eclipsing the next annual Budget. Canada does not have a statute like the UK *Provisional Collection of Taxes Act 1968*, giving temporary legal effect to budget proposals, but we overcome the constitutional problem of taxing without authority by giving the enacted law retroactive application. For example, the 2009 Budget introduced the 'home renovation tax credit', which applied to expenditures for work performed or goods acquired in a one-year period commencing after 27 January 2009 (the date of the 2009 Budget).[14] More recently, the 2010 Budget proposes to amend the definition of 'taxable Canadian property' to exclude certain shareholdings and other interests that do not derive their value principally from real property or resource property situated in Canada. This change is being made to improve consistency with international tax norms. The amended definition is proposed to be effective after 4 March 2010 (the date of the 2010 Budget). This type of retroactivity is sometimes criticized but there is no legal sanction to prevent it.

Less commonly, a tax enactment may be made retroactive to a time earlier than any announcement. A notorious example is the 2005 amendment to section 245 of the *ITA* – Canada's general anti-avoidance rule ('GAAR').[15] Following certain Tax Court decisions which indicated that the GAAR, as written, might not apply to an abuse of the *Income Tax Regulations* or a tax treaty, the rule was amended to 'clarify' that the GAAR applies to a misuse or abuse of the provisions of the *ITA*, *Income Tax Regulations*, *Income Tax Application Rules*, a tax treaty, or any other enactment that is relevant in computing tax or other amount payable by a person. The amendment was made effective with respect to transactions entered into after 12 September 1988 (that is, retroactive to the introduction of the GAAR). More recently, the 2010 Budget proposes to strengthen the specific anti-avoidance rules in sub-

12. *Budget Implementation Act, 2009*, S.C. 2009, c. 2, s. 33 (assented to on 12 March 2009).
13. Id., s. 39. The increase to the income threshold was prorated for corporations with taxation years that do not coincide with the calendar year.
14. *Economic Recovery Act (stimulus)*, S.C. 2009, c. 31, s. 4 (assented to on 15 December 2009).
15. *Budget Implementation Act, 2004 (No. 2)*, S.C. 2005, c. 19, s. 52. The relevant notice of ways and means motion provided: 'That, *for greater certainty*, subsection 245(4) of the Act *has operated from its inception* to exclude a transaction from the operation of subsection 245(2) of the Act only where it may reasonably be considered that the transaction would not result directly or indirectly in a misuse of the provisions of the *Income Tax Act*, the *Income Tax Regulations*, the *Income Tax Application Rules*, any enactments amending the *Income Tax Act*, the *Income Tax Regulations*, the *Income Tax Application Rules* or a tax treaty, or in an abuse having regard to those provisions, read as a whole' [emphasis added].

sections 96(8) and (9) of the *ITA*, which, in general terms, prohibit the importation of foreign partnership losses by Canadian taxpayers, effective for partnership fiscal periods that begin after 22 June 2000. This type of retroactivity is perhaps more objectionable from a rule-of-law perspective than the previously mentioned subcategory, but no conceptual distinction between the two is made in Canada's constitution or case law.[16]

b. Clear distinction between 'retroactivity' and 'retrospectivity'?
As discussed at 3.4.2.1 above, there was formerly no clear demarcation in Canada, following the British tradition. This led to an unfortunate degree of ambiguity in the law. The modern approach, dating from 1997 if not before, is to treat retroactivity and retrospectivity as distinct concepts. Legislation is considered retroactive only when it changes the past legal consequences of past situations: that is, when it is deemed to have come into force prior to its enactment. Retrospective legislation is that which alters the future legal consequences of past situations.

c. Relevance of tax period
It was explained above that amendments to annual income tax concepts are often effective from the beginning of the current tax year. Arguably, it is not correct to call this sort of temporal application 'retroactivity' at all. Some amendments to income tax rules or other tax rules may be retroactive such that they attach legal consequences to transactions or events occurring after the announcement/effective date. Usually, but not always, the announcement/effective date is earlier in the same taxation year, particularly with federal Budget announcements occurring in February or March. It is less common for legislation to be retroactive to a time preceding any announcement of the change.

In any event, the prevailing practice in Canada for at least the last 40 years has been to decree specific effective dates for most amendments to tax legislation. Sometimes the effective date will be prior to the current tax year, perhaps matching the date of announcement by Budget or press release, or perhaps coinciding with the date of introduction of some related legislation. As evidence of this, the 2010 Budget contains a wide array of effective dates. Whether an enactment reaches back to an earlier date in the current year or to an earlier year seems to make no difference. The Canadian constitutional tradition is that Parliament, acting on the advice of the Department of Finance, is free to make laws effective whenever they see fit.

3.4.2.3. **Interpretative statutes**

a. Phenomenon of 'interpretative statutes' explicitly known?
All Canadian federal legislation is interpreted according to the *Interpretation Act* unless otherwise provided.[17] There are provincial interpretation statutes as well. It is worth mentioning sections 42 through 45 of the *Interpretation Act*, which deal with the effects of legislative repeal and amendment. For example, paragraph 43(c) provides: 'Where an enactment is repealed in whole or in part, the repeal does not affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed.' Paragraph 44(f) states that, where a new enactment is substituted for a former enactment, 'except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new

16. Tax lawyers continue to draw a distinction. See: Sherbaniuk, *supra* note 6; G.T. Loomer, 'Taxing Out of Time: Parliamentary Supremacy and Retroactive Tax Legislation', *British Tax Rev.* 64 (2006); T.E. McDonnell, 'Retroactivity: Policy and Practice' in: *2006 Conference Report* (Toronto: Canadian Tax Foundation, 2007), at p. 2:1.
17. *Interpretation Act*, *supra* note 11, s. 3(1).

law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment'. This list of transitional rules is not exhaustive.

The *Interpretation Act* and analogous provincial statutes set out only general interpretive rules which are written in a formalistic style. They do not set out principles governing the retroactive or retrospective application of legislation. Moreover, the *Interpretation Act* does not have any special status under the Canadian constitution and the interpretive rules it contains are always subject to expressed contrary intention in the specific legislation at issue.

Perhaps more interesting is the *Income Tax Conventions Interpretation Act*,[18] which sets out rules as to how Canada's tax treaties, and the statutes implementing those treaties, should be interpreted. This short enactment has on a few occasions been amended retroactively. For example, section 6.2 was added in 1991, retroactive to 1983, to ensure that a Canadian partner's share of partnership income is taxable even though the partnership may be considered a resident or enterprise of another country under a Canadian tax treaty.[19] Section 4.1 was added in 2005, retroactive to 1988, to provide that the GAAR can apply to a benefit obtained under a tax treaty. This change was made to support the 2005 retroactive amendment to the GAAR itself.[20]

Retroactive amendments to such interpretation statutes are not evaluated any differently than retroactive amendments to other legislation.

3.4.2.4. **Validation statutes**

a. Phenomenon of 'validation statutes' known?

Canada does not recognize 'validation statutes' as such. Nor could the *Interpretation Act* or *Income Tax Conventions Interpretation Act* be used to retroactively validate some official view of how a provision in tax legislation should have been interpreted, following a contrary judicial decision, unless the interpretation statute was itself amended to achieve that result.

If a Canadian court interprets a tax provision in a manner that the Canada Revenue Agency ('CRA') does not agree with, or that the Department of Finance (or provincial equivalent) did not intend, the federal or provincial government simply uses amending legislation to overrule that interpretation, sometimes retroactively. There are a number of examples where provincial tax legislation has been held to be *ultra vires*, that is, inconsistent with specific requirements of Canada's written Constitution, and the provincial legislature has subsequently passed legislation to correct the incompatibility and to declare that amounts collected under the prior law are deemed to have been validly obtained.[21] One might describe such legislation as a validation statute.

In the notice of ways and means motion and legislative notes explaining such a change, the Department of Finance (or provincial equivalent) invariably states that the change is being made to 'clarify' the law. While the use of the word 'clarify' is often legitimate, on other occasions it is contentious (and arguably shows a misunderstanding of, or disrespect for, the role of the judiciary in Canada's constitutional structure). Nonetheless, there appear to be no legal standards to assess or evaluate the legitimacy of 'clarifying' tax amendments, any more than for other retroactive tax legislation. The Supreme Court of Canada in *Kingstreet Investments* has effectively *encouraged* the use of remedial retroactive tax

18. R.S.C. 1985, c. I-4.
19. This amendment was designed to prevent the application in Canada of the reasoning in *Padmore v. Inland Revenue Commissioners* [1989] S.T.C. 493 (Eng. C.A.).
20. *Supra* note 15.
21. See *Air Canada v. British Columbia* [1989] 1 S.C.R. 1161; *Re Eurig Estate* [1998] 2 S.C.R. 565.

legislation,[22] as discussed in 3.4.6.1 below. Criticism of such legislation is limited to the academic, political and commercial contexts.

3.4.2.5. **Comparison moment**

Although the concept of a 'comparison moment' is not addressed in Canadian legal discourse, it is fair to say that the comparison moment for determining whether or not legislation is retroactive is the date of enactment, which in Canada is the date of Royal Assent.

A proposed tax change, like any federal legislative change, becomes enacted law only when it has passed through the House of Commons and Senate and has been given Royal Assent. The Governor General gives Royal Assent, in the Queen's name, to bills that have been passed by both Houses of Parliament. Royal Assent is considered the 'constitutional culmination of the legislative process'.[23] The default rule is that legislation comes into force upon Royal Assent,[24] but the legislation itself may prescribe an earlier or later effective date (also known as commencement date). If a tax provision is given an effective date which precedes Royal Assent, it is correctly described as retroactive.

3.4.2.6. **Concept of retrospectivity**

a. Definition of retrospectivity

As explained previously, modern Canadian legal terminology characterizes legislation as retrospective when it alters the future legal consequences of past situations. Retrospective legislation is effective only from the moment that it receives Royal Assent, or from a prescribed date following Royal Assent, but it refers in some way to past transactions or events. As stated by Professor Côté [translation]:

> Retrospective effect implies that the new statute separates the effects of an occurred fact at the moment of change: effects prior to the change are governed by the old statute while those occurring after are governed by the new statute.[25]

Côté and other Canadian scholars have observed that it can be exceedingly difficult to distinguish a retrospective enactment from an enactment that has immediate effect only on current, continuing rights.

b. Examples of retrospectivity

In tax law, many changes are nominally retrospective. Current legislation may provide that the occurrence or existence of certain facts will confer tax advantages on a taxpayer in subsequent years, or will require a taxpayer to meet tax obligations in subsequent years. If, after the relevant facts have occurred, Parliament amends the legislation to repeal such advantages or enlarge such obligations for future periods, then past events are given new legal consequences (but only in the future). This is exactly the sort of change that was at issue in *Gustavson Drilling*, where an oil exploration company sought to deduct certain drilling and related expenses incurred prior to 1960 by a predecessor company. Legislation enacted in 1962 had repealed the availability of such deductions for taxation years following 1962. A majority of the Supreme Court of Canada rejected the taxpayer's argument that the legislation was retroactive. The legislation certainly denied for the future a right to deduct expenses enjoyed in former years, but it did not 'reach into the past and declare that the law

22. *Kingstreet Investments*, *supra* note 9, paras. 12, 25.
23. Codified in the preamble to the *Royal Assent Act*, S.C. 2002, c. 15.
24. *Interpretation Act*, *supra* note 11, s. 5.
25. Côté, *supra* note 7, p. 134.

or the rights of parties as of an earlier date shall be taken to be something other than they were'.[26] Dickson J. went on to say, in the particular context of tax legislation, that 'no one has a vested right to continuance of the law as it stood in the past'.[27]

There are numerous more recent examples. One is the enhancement of the lifetime capital gains exemption, applicable to dispositions by Canadian residents of qualifying small business corporation shares and certain other property. In 2007 Parliament increased this exemption from CAD 250,000 to CAD 375,000 of taxable capital gains.[28] This change applied only to dispositions of qualified property on or after 19 March 2007 (the Budget date) but obviously benefited small business owners whose shares had appreciated to that extent before that date. Another example is the introduction of the special tax on publicly-traded income trusts, discussed at 3.4.4.2 below.

It is instructive to contrast these changes with a series of amendments that were *not* retrospective. Parliament extended the carry-forward period for business losses from seven to ten years in the 2004 Budget, effective for losses incurred in tax years ending after March 2004, and then to 20 years in the 2006 Budget, effective for losses incurred in 2006 and later tax years.[29] Because of these effective dates, business losses that arose in earlier time periods are not 'refreshed': that is, they are not given the benefit of the 10-year or 20-year claim period going forward.

3.4.2.7. **Distinction between substantive and procedural statutes**

a. With respect to the impact of a statute having immediate effect

The traditional position in Canadian law, following the common law of the United Kingdom, is to recognize a distinction between substantive and procedural statutes with respect to their temporal effect. It is presumed as a matter of statutory interpretation that changes which are purely procedural apply immediately and generally to legal proceedings, including those that have commenced but have not been completed at the time of the change.[30] This presumption is codified, at least in part, in the federal *Interpretation Act* and provincial equivalents.[31] The rationale is that changes to matters of legal procedure are expected to be for the benefit of litigants and the public, and thus should apply to pending as well as future proceedings. In some situations this could entail a retrospective application of the procedural legislation. The rebuttable interpretive presumption against retroactive and retrospective effect (discussed at 3.4.5 below) is considered inapplicable to purely procedural legislation.

The distinction is of virtually no significance in Canadian tax law, however, given the modern practice of expressly providing an effective date for all tax law changes, whether substantive or procedural.

b. Rules considered procedural rules

There is no clear answer to this in Canadian tax law. The view of the Supreme Court is that the classification of a rule as substantive or procedural will depend on the facts of each case. A tax law provision would likely be seen as procedural only where it alters the *manner* of

---

26. *Gustavson Drilling*, *supra* note 5, p. 279. The Court used the term 'retrospective' in the sense that Canada now uses 'retroactive'. If the judgment were rewritten today, the legislation at issue would most likely be characterized as 'retrospective'.
27. *Gustavson Drilling*, *supra* note 5, pp. 282–83.
28. *Budget and Economic Statement Implementation Act, 2007*, S.C. 2007, c. 35, s. 31, amending the *ITA*, s. 110.6(2).
29. *Budget Implementation Act, 2004 (No. 2)*, S.C. 2005, c. 19, s. 20 and *Budget Implementation Act, 2006*, S.C. 2006, c. 4, s. 57, both amending the *ITA*, s. 111(1)(a).
30. *Angus v. Sun Alliance Insurance Co.* [1988] 2 S.C.R. 256; Sullivan, *supra* note 7, at pp. 582–589; Côté, *supra* note 7, at pp. 176–189.
31. *Interpretation Act*, *supra* note 11, s. 44(c), 44(d).

making an assessment, instituting an appeal, presenting evidence, and so on. Anything that affects the content of an assessment or appeal will be classified as substantive. For example, extending a time period for the assessment of taxes or the recovery of tax debts would most likely be considered a substantive change, whether the former limitation period was extant or expired as of the date of the change.[32]

Consider two examples. In 1994, following a Federal Court of Appeal decision that allowed a large resource company to claim unexpected deductions, the *ITA* was amended such that any 'large corporation' (as defined) is required to provide greater details for each issue it raises in a Notice of Objection filed with the CRA; failure to do so prevents the corporation from subsequently raising the undisclosed issue in Tax Court proceedings.[33] This change might be seen as procedural or substantive. Whatever the case, detailed transitional rules provided that the new regime was effective after 26 September 1994 for Notices of Objection filed at any time, except where an appeal to the Tax Court was instituted by 22 June 1995. More recently, in response to a Supreme Court decision which held that Crown proceedings legislation prevented the collection of federal tax debts which had been dormant for more than six years, the *ITA* was amended retroactively to create a 10-year limitation period.[34] The new rules expressly provide that a fresh 10-year limitation period begins after 3 March 2004 (the date of the 2004 Budget) in respect of any tax debt that arose before that date and remains unpaid. In this sense the amendment is retrospective to the dawn of federal taxation in Canada.

3.4.3. Ex ante evaluation of retroactivity

3.4.3.1. In general

Any evaluation of the retroactivity of a proposed federal tax enactment is done by the Department of Finance. It is possible, but highly unlikely given the complexity of tax legislation, that Parliament would disagree with that evaluation. One commentator has noted that, given the lack of ex ante constraints on retroactivity of tax legislation in Canada, 'as a practical matter it is legislative self-restraint that determines the frequency and extent of such measures'.[35]

3.4.3.2. Constitutional limitations to retroactivity of tax statutes

The dominant view is that there are no constitutional limitations on retroactive taxation in Canada.

Canada does have a written Constitution,[36] including the *Canadian Charter of Rights and Freedoms* (the 'Charter').[37] Legislation that is inconsistent with the Constitution is, to the extent of the inconsistency, of no force or effect. However, nothing in the Constitution expressly prohibits or restricts retroactive legislation, save in the area of criminal law. At one time it was believed that section 7 of the Charter might be a basis for challenging retroactivity of non-criminal laws but, as discussed at 3.4.5 below, Canadian courts definitively rejected that proposition over 20 years ago.

---

32. *Martin v. Perrie* [1986] 1 S.C.R. 41; *Angus v. Sun Alliance*, *supra* note 30.
33. *ITA*, ss. 165(1.11)–(1.14) and 169(2.1), enacted in response to *Gulf Canada Ltd. v. The Queen* [1992] 1 C.T.C. 183 (F.C.A.).
34. *ITA*, s. 222(1)–(10), enacted in response to *Markevich v. Canada* [2003] 1 S.C.R. 94, 2003 SCC 9.
35. Sherbaniuk, *supra* note 6, p. 739.
36. Collectively, the *Constitution Act, 1867*, *supra* note 1, and the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11.
37. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*.

An older statute having quasi-constitutional status is the *Canadian Bill of Rights* (the 'Bill of Rights').[38] Among other rights, this statute grants limited protection to an individual's enjoyment of property. As with the Charter, Canadian courts have decided that the Bill of Rights does not create any impediment to retroactive tax legislation.

Arguments based on constitutional principles that *underlie* the Canadian legal system, in particular the principles of legal certainty and the rule of law, have not been vigorously pursued in this country. Recent decisions of the Supreme Court indicate that these principles have little, if any, justiciable content.[39]

3.4.3.3. **Transition policy of government**

Canada does not have an official tax transition policy as such. There is certainly no statute laying out rules as to the use of retroactivity, retrospectivity, grandfathering, or other transitional measures. The default transitional rules contained in the *Interpretation Act* apply only to the interpretation of enacted laws, not to their design or promulgation.

The Department of Finance published a list of self-imposed restrictions on the use of retroactive tax legislation in a document issued in 1995 (the 'Finance Report').[40] The Finance Report does not address the typical category of retroactivity, namely, tax laws made effective from the date of a Budget announcement or other announcement. Instead it sets guidelines for the use of retroactive tax measures to clarify or correct an unintended interpretation of a tax provision by a court. The introduction to the Finance Report states that '[r]etroactive clarifying amendments should only be made in exceptional situations'. The following five guidelines are provided:

It may be appropriate to adopt retroactive clarifying changes where:

'– the amendments reflect a long-standing well-known interpretation of the law by the Department of National Revenue [now the CRA];
– the amendments reflect a policy that is clear from the relevant provisions that is well-known and understood by taxpayers;
– the amendments are intended to prevent a windfall benefit to certain taxpayers;
– the amendments are necessary to preserve the stability of the Government's revenue base; and
– the amendments are corrections of ambiguous or deficient provisions that were not in accordance with the object of the Act.'[41]

Further considerations are said to be important where litigation is pending with respect to the potentially deficient legislation. These include 'the amount of tax revenue at risk in the objection and appeal process' and 'the stage of the judicial process that has been reached by a test case dealing with the issue to be dealt with by the change'.[42] Thus, no bright line test is used to decide whether pending proceedings should be excused from the legislative change.

It is unclear whether, in 2010, the Department of Finance continues to feel bound by these restrictions. The Finance Report is not available online and apparently no copy is kept in the Department of Finance library.[43] The use of words such as 'clarify' and 'for greater

38. S.C. 1960, c. 44.
39. *British Columbia v. Imperial Tobacco Canada Ltd.* [2005] 2 S.C.R. 473, 2005 SCC 49; *British Columbia (Attorney General) v. Christie* [2007] 1 S.C.R. 873, 2007 SCC 21.
40. Canada, Department of Finance, *Comprehensive Response of the Government of Canada to the Seventh Report of the Standing Committee on Public Accounts* (Ottawa: Department of Finance, September 1995).
41. Id., at pp. 15–17. For further discussion see McDonnell, *supra* note 16, at pp. 2:17–2:20.
42. Id., at pp. 17–18.
43. This is based on the author's own investigations and communications with the Department of Finance.

certainty' in proposals for remedial retroactive legislation suggests that the Department does have some regard to the guidelines. In any event, according to the overriding constitutional principle of parliamentary sovereignty/supremacy, the lawmakers in Parliament can disregard such restrictions where they believe it is warranted.

3.4.3.4. **Ex ante control by an independent body**

In Canada neither the federal government nor the provincial governments have an advisory body such as a Council of State. The Senate, which is the upper house of Parliament, might ask the House of Commons to adjust the effective date of a tax amendment, but in practice the Senate never does this. It is also possible for the executive to issue a 'reference' to the Supreme Court of Canada regarding proposed legislation, usually to evaluate its consistency with the written Constitution.[44] This process never occurs with respect to the proposed retroactivity of tax laws.

As such, there is no independent body applying any set of rules on an ex ante basis to review negative retroactivity, favourable retroactivity, retrospectivity, or grandfathering in Canadian tax legislation.

3.4.4. **Use of retroactivity in legislative practice**

3.4.4.1. **In general**

The use of retroactive legislation in Canada is, of course, not unique to taxation. However, no other area of statute law appears to be as rife with backdated provisions. Reasons for this phenomenon include the length of the Budget process and the desire of governments to protect revenues, particularly when threatened by unforeseen tax avoidance schemes. But the paramount reason for the use of retroactivity in the tax area is that Canadian courts, guided by the overriding principle of parliamentary sovereignty/supremacy inherited from the United Kingdom, continue to affirm that there are no limits on Parliament's legislative authority. It is a practice that taxpayers and lawyers 'have resigned themselves to with dejected pragmatism'.[45]

3.4.4.2. **'Legislating by press release'**

a. In general

The constitutional tradition in Canada is to make tax enactments effective from the date of the annual Budget announcement. It is also possible for changes to be made effective concurrent with a press release, draft legislation, or other Ministerial announcement.

b. Use of 'legislating by press release'

Some recent examples of tax enactments made effective from the date of the annual Budget announcement are mentioned at 3.4.2.2 above. The benefit of this procedure is that the proposed changes are formally introduced in Parliament by a notice of ways and means motion and are widely disseminated, allowing taxpayers to adjust expectations and rely with reasonable certainty on what the law will be. It is less common for changes to be announced by press releases, which do not have the constitutional formality or public exposure of annual Budgets. Nevertheless, press releases are used where it suits the government's needs to do so.

---

44. *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 53. See, e.g., *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.
45. V. Krishna, *Fundamentals of Income Tax Law* (Toronto: Carswell, 2009), at p. 25.

For example, on 31 October 2006, the federal government published a press release giving notice of its intention to amend the *ITA* to impose a new tax on publicly-traded income trusts, similar to the tax on corporations.[46] It stated that the extensive conversion of large public corporations to income trusts was 'creating an economic distortion that is threatening Canada's long-term economic growth and shifting any future tax burden onto hard-working individuals and families'. The amendments were enacted as part of the statute implementing the 2007 Budget.[47] In broad terms, the changes are effective 1 January 2007 for any trust that was not publicly traded on 31 October 2006 (that is, newly formed income trusts), and are effective beginning in the 2011 taxation year for trusts that were trading on 31 October 2006 (that is, existing income trusts). This legislation is in a sense prospective, because the new tax is delayed until 2011 for income trusts that existed as of the announcement date, and is in another sense retrospective, because it creates new tax consequences for business vehicles that were established precisely to take advantage of existing income tax rules (predominantly in the 2000–2006 period).

c. Kind of situations

There are many situations where a tax enactment might be made effective from the date of a press release rather than the more customary Budget announcement date. For example, a sudden change in general economic circumstances, or the disclosure of some novel tax avoidance strategy, might prompt an announcement of proposed tax changes effective as of that date, rather than the government going through the more onerous Budget process. In short, this method is used whenever the Department of Finance feels it is appropriate.

3.4.4.3. **Retroactive effect further back than first announcement**

It is less common for Canadian tax legislation to be made effective prior to any announcement date.

Generally this type of change is restricted to neutral, corrective amendments, such as those that fix numbering, cross-referencing and linguistic errors. For example, the 2010 Budget proposes to correct an unintended inconsistency between French and English versions of subsection 15(2) of the *ITA*, dealing with shareholder benefits in respect of outstanding loans. This amendment will apply to loans arising in the 1990 and subsequent taxation years.

The more troubling category of retroactivity is the phenomenon of remedial retroactive tax legislation, that is, amendments used to 'clarify' a tax provision so as to prohibit a particular tax avoidance strategy, 'overrule' an unfavourable judicial decision, or both. The 2005 amendment to the GAAR, noted above, is a recent example.

3.4.4.4. **Pending legal proceedings**

a. Influence of retroactive tax statutes

Legislation that is retroactive to the announcement date will affect pending legal proceedings, assuming that those legal proceedings deal with substantive issues arising in the period after the announcement/effective date. Given the time it takes for disputed issues to move through the objection and appeal process in Canada, it is unlikely that this problem arises very often. However, it can occur where there are long delays between the announce-

46. Canada, Department of Finance, 'Canada's New Government Announces Tax Fairness Plan', *News Release no. 2006-061* (31 October 2006).
47. *Budget Implementation Act, 2007*, S.C. 2007, c. 29, amending or adding *ITA* ss. 104(16), 122(1), 122.1, and related provisions.

ment and the enactment of legislation; in such cases the litigants are bound by the amended law.[48]

It is unclear to what extent legislation that is retroactive prior to announcement can affect pending legal proceedings that turn on substantive issues which arose years in the past (but after the effective date). In *Canada Trustco*, the Supreme Court of Canada confirmed that the 2005 retroactive amendment to the GAAR was valid, yet stated that the amendment could not affect the taxpayer's appeal as it had already proceeded through the Tax Court and the Federal Court of Appeal on the basis of the unrevised GAAR.[49] The Supreme Court avoided discussing this issue any further by observing that it made no difference which version of the GAAR was applied in the case.

b. Pending legal proceedings excluded from application of retroactivity?

Generally there is no express exception made for pending legal proceedings when substantive legislation operates retroactively. In the case of remedial legislation designed to address an issue raised in litigation, the Department of Finance may consider the guidelines mentioned at 3.4.3.3 above when setting the effective date. Where there is a substantial amount of revenue at risk and the relevant proceedings are at an early stage, Parliament or the relevant provincial legislature may enact retroactive measures specifically to *forestall* the litigants' claims, as the British Columbia legislature did in *Air Canada v. British Columbia*,[50] discussed at 3.4.5.2. However, the courts may decide (as in *Canada Trustco*) that it is inappropriate to apply the revised law if the proceedings are at an advanced stage. Where the retroactive rule is itself a procedural rule, the Department of Finance generally takes this into consideration and specifies that the rule is effective only for proceedings instituted after a certain date. A good example is the introduction of the large corporation objection rules, discussed at 3.4.2.7.b above.

It should be noted that, although pending legal proceedings may be affected by a retroactive change, *completed* legal proceedings are generally immune. Canada has a long history of excusing successful litigants from retroactive curative legislation, either by express exception in the legislation or by unexpressed administrative concession.[51] Perhaps this is because the Department of Finance recognizes that pursuing proceedings in court could be seen by citizens as a futile exercise if retroactive measures could deny them the fruits of victory, which would undermine the integrity of the legal system.

3.4.4.5. **Favourable retroactivity**

There are various examples of favourable retroactive measures in Canadian tax law. For example, there was concern that the lifetime capital gains exemption on a disposition of qualified small business corporation shares might be denied in circumstances that Parlia-

48. E.g. *Huet v. Canada* [1995] 1 C.T.C. 367 (F.C.T.D.).
49. *Canada Trustco*, *supra* note 9, para. 7.
50. *Supra* note 21.
51. For example, in *Royal Bank of Canada v. Sparrow Electric Corp.* [1997] 1 S.C.R. 411, the Supreme Court of Canada held that the Royal Bank's security interest in the assets of an insolvent corporation ranked ahead of the government's trust interest in certain unremitted payroll deductions. Parliament responded by amending the *ITA*, essentially providing that the government's interest in an employer's unremitted source deductions is superior to the interest of any secured creditor. The amendments were announced in 1997 and enacted in 1998, retroactive to 1994, with an express exception for the Royal Bank. A similar example in the provincial context arose from the case of *Re Eurig Estate*, *supra* note 21. The Supreme Court of Canada determined that an Ontario regulation imposing probate fees was invalid because it effectively imposed a tax without statutory authority, contrary to the *Constitution Act, 1867*. The Ontario legislature retroactively neutered this decision by enacting the *Estate Administration Tax Act, 1998*, S.O. 1998, c. 34, with a specific exemption for the estate of Mr Eurig. See also Sherbaniuk, *supra* note 6, at pp. 743–45.

ment did not intend, based on an unexpected interpretation by the Federal Court of Appeal of the rule in subsection 256(9) of the *ITA* (which deals with the timing of acquisition of control of a corporation). The 2009 Budget amended the timing rule to ensure that it does not have this result,[52] generally retroactive to 2006. More recently, the 2010 Budget proposes to amend paragraph 8(1)(b) of the *ITA* to allow greater scope for the deduction by employees of legal fees paid to collect or establish a right to income, effective for fees paid after 2000. Both of these changes will benefit Canadian taxpayers.

3.4.5. Ex post evaluation of retroactivity (in case law)

3.4.5.1. In general

Almost all of the Canadian case law, like that of the United Kingdom, deals with retroactivity as an issue of statutory interpretation and application. There is a common law presumption that legislation operates prospectively and not retroactively (or retrospectively), yet this presumption is fully rebuttable where Parliament expresses a contrary intention. The leading case is *Gustavson Drilling*, where Justice Dickson referred to the general rule that 'statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act'.[53] In subsequent cases the courts have refused to elevate this interpretive presumption to the level of a constitutional principle. The only constitutional limitation is in respect of criminal offences. Outside of the criminal law context, where Parliament has dictated that an enactment is to be considered effective as of a particular date in the past, Canadian courts have no choice but to apply the law as expressed. This is an aspect of parliamentary sovereignty/supremacy as understood in both British and Canadian constitutional law.[54]

3.4.5.2. Testing against the Constitution and legal principles

In tax legislation the common law rebuttable presumption of non-retroactivity is invariably displaced by an express statement of the effective date for the provisions. Some taxpayers who perceive that the retroactive effect of a particular tax enactment is unfair have instituted court proceedings in which they have advanced arguments based on the Charter,[55] the Bill of Rights,[56] and unwritten constitutional principles. All of these challenges have failed.

Let us consider the Charter arguments first. Canada, like many other countries, has prohibited retroactive criminal legislation in its written Constitution. Paragraphs 11(g) and 11(i) of the Charter limit Parliament's power to enact retroactive criminal offences and retroactive increases in criminal penalties, much like Article 7 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ('ECHR'). At one time it was believed that section 7 of the Charter might be a basis for challenging retroactivity of non-criminal laws, including tax laws.[57] Section 7 provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

---

52. *Budget Implementation Act, 2009*, S.C. 2009, c. 2, s. 78, amending *ITA* s. 256(9) [enacted in response to *La Survivance v. The Queen* [2007] 1 C.T.C. 189, 2006 FCA 129].
53. *Gustavson Drilling*, *supra* note 5, at p. 279.
54. *Colonial Sugar Refining Co. Ltd. v. Irving* [1906] A.C. 360 (P.C.), at p. 366; *James v. Internal Revenue Commissioners* [1977] S.T.C. 240 (Ch.), at p. 244.
55. *Supra* note 37.
56. *Supra* note 38.
57. Sherbaniuk, *supra* note 6, pp. 736–39.

Taxpayers have invoked section 7 in various challenges to fiscal legislation, in the belief that 'security of the person' encompasses economic security. That belief was dashed by Canadian courts, which have consistently held that section 7 does not protect purely economic rights.[58]

The most relevant case in this area is *Air Canada v. British Columbia*,[59] in which a number of airlines sought restitution of provincial gasoline taxes they had previously paid. A decision of the Privy Council had found a similar tax to be *ultra vires* the provincial legislature because it was not a 'direct tax' as required by the *Constitution Act, 1867*. The province remedied its gasoline tax statute in 1976 and amended it further in 1981, expressly providing that amounts collected under the unconstitutional provisions were 'conclusively deemed to have been confiscated by the government without compensation', retroactive to 1974. The airlines contended that they were entitled to be reimbursed for moneys paid between 1974 and 1976 because the purported retroactivity was unlawful. That argument was rejected by the Court. Justice La Forest, agreeing with the courts below, was 'unable to see any constitutional impediment' to the province enacting the retroactive taxation provisions.[60] He held that the Charter right to life, liberty or security of the person was not engaged: the retroactive enactment merely required the appellants to pay taxes in the same way as other purchasers of gasoline in the province. In subsequent cases where taxpayers have challenged the retroactive effects of fiscal legislation, the courts have cited *Air Canada* in concluding that there is no nexus between taxation and a person's life, liberty or security.[61]

Taxpayers in Canada have also challenged federal tax laws under the Bill of Rights. In contrast to section 7 of the Charter, paragraph 1(a) of the Bill of Rights grants limited protection to an individual's life, liberty, security and 'enjoyment of property', stating that he shall not be deprived thereof except 'by due process of law'. In this respect the Bill of Rights is similar to Article 1 of the First Protocol to the ECHR. At one time it was thought that arguments based on the Bill of Rights might be sustained in Canada, following American case law interpreting the Fifth Amendment to the US Constitution, at least for very long-term retroactivity.[62] The taxpayer in *Huet* raised both section 7 of the Charter and paragraph 1(a) of the Bill of Rights in challenging a tax amendment that was retroactive to a time 16 months before its enactment (the date of the announcement). Justice Noël held that the Bill of Rights argument could not succeed because it was impliedly rejected by the Supreme Court in *Gustavson Drilling* and *Air Canada*.[63]

Arguments based on constitutional principles that *underlie* the Canadian legal system, in particular the principles of legal certainty and the rule of law, have not been vigorously pursued in this country. The Supreme Court of Canada has on occasion emphasized that there are 'vital unstated assumptions' that underlie and inform the entire constitutional text, particularly the principles of democracy, constitutionalism and the rule of law.[64] However, attempts by lawyers to invoke these principles when arguing against retroactive tax laws, as in *Huet*, have failed. More recent decisions of the Supreme Court indicate that these principles have little, if any, justiciable content. In *Imperial Tobacco* (which was not a tax case), Justice Major for the Court stated:

---

58. E.g. *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 S.C.R. 927.
59. *Supra* note 21.
60. *Supra* note 21, at pp. 1192–93.
61. E.g. *Hokhold v. Canada* [1993] 2 C.T.C. 99 (F.C.T.D.), paras. 28–34; *Huet*, *supra* note 48, paras. 23–31.
62. Sherbaniuk, *supra* note 6, at pp. 734–36.
63. Huet, *supra* note 48, paras. 32–35.
64. *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, paras. 32, 49–51; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 S.C.R. 3, paras. 89–92; *Reference re Manitoba Language Rights* [1985] 1 S.C.R. 721, at pp. 747–52.

> Except for criminal law, the retrospectivity and retroactivity of which is limited by s. 11(g) of the Charter, there is no requirement of legislative prospectivity embodied in the rule of law or in any provision of our Constitution.[65]

Some commentators nevertheless argue that a court might rely on the rule of law to curtail the retroactive reach of tax legislation if the retroactivity were extreme.[66] To date this has not happened.

3.4.5.3. Examination method

Examinations of retroactivity are not extensive in Canadian case law. Typically there is a brief reference to the common law rebuttable presumption that legislation is not retroactive (or retrospective) unless otherwise expressed, followed by an affirmation that Parliament has supreme legislative authority.[67] The courts that have been presented with arguments based on section 7 of the Charter, paragraph 1(a) of the Bill of Rights, and the rule of law principle have done little more than assert that such rules and principles do not limit retroactive tax legislation, citing the relevant case precedents.

3.4.5.4. Testing against Article 1 of the First Protocol ECHR

The ECHR is, of course, not applicable in Canada. The provision most analogous to Article 1 of the First Protocol is paragraph 1(a) of the Bill of Rights, which states that an individual shall not be deprived of the 'enjoyment of property' except 'by due process of law'. Canadian courts have concluded that this provision does not apply to retroactive tax legislation, particularly in the *Huet* decision. The analysis leading to that conclusion has been brief.

3.4.5.5. Examination method for testing against principle of legal certainty

There is no such principle recognized in Canada, other than the common law rebuttable presumption of non-retroactivity, and similar interpretive rules, which can be seen as *reflections* of the principle of legal certainty. However, rebuttable interpretive presumptions do not have any constitutional status, as discussed at 3.4.5.2.

3.4.5.6. Interpretations by courts to avoid retroactivity

There are some instances where Canadian courts have applied the common law rebuttable presumption of prospectivity in order to avoid a retroactive or retrospective effect of legislation other than tax legislation. This occurs only where the legislation is ambiguous as to its intended effective date. The practice of prescribing effective dates and related transitional rules for all tax enactments ensures that there is no scope for the presumption to be applied to tax legislation.

---

65. *Imperial Tobacco*, *supra* note 39, para. 69.
66. See Edinger, *supra* note 6, at pp. 16–23; Loomer, *supra* note 16, at pp. 82–89.
67. In addition to the examples already provided, see: *MIL (Investments) S.A. v. The Queen* [2006] 5 C.T.C. 2552, 2006 TCC 460, affirmed [2007] 4 C.T.C. 235, 2007 FCA 236 (retroactivity of GAAR); *Gibson v. The Queen* [2006] 2 C.T.C. 5, 2005 FCA 180 (retrospectivity of 10-year limitation period).

3.4.5.7. **Reasons for lack of judicial limits to retroactivity**

Canada's written Constitution does not set any express limits on the temporal effect of non-criminal laws. Canadian courts are hesitant to suggest any constitutional limitations on the legislative authority of Parliament beyond those that are expressed in the Charter and the other provisions of the written Constitution. As noted above, the Supreme Court of Canada has stated that the rule of law is one of the 'vital unstated assumptions' that underlie and inform the Canadian Constitution. However, Canadian courts have not yet been willing to regard the rule of law as a principle that can be invoked in order to limit Parliament's authority to legislate in the past. This judicial reluctance is perhaps understandable given the uncertain boundaries of the 'rule of law'.

3.4.6. **Retroactivity of case law**

3.4.6.1. **Temporal effect of judicial change of course**

Canada follows the tradition of the United Kingdom in placing great emphasis on the common law. Developments in the common law are generally considered to have retroactive and retrospective effect, on the theory that the courts are interpreting and explaining what the law has always been.[68]

An exception is recognized, however, where the Supreme Court acknowledges that it has abandoned or shifted away from prior case law. In *Canada (Attorney General) v. Hislop*,[69] the Supreme Court observed that where judicial intervention results in a 'substantial change' in the law (particularly in constitutional adjudication), factors such as good faith reliance by governments, fairness to the litigants, and the need to respect the constitutional role of legislatures must be considered in order to determine whether it is appropriate to limit the retroactive effect of any remedy.[70] In *Hislop*, the judicial recognition in 1999 of the equality rights of same-sex couples was held to be such a substantial change; thus the remedy sought was limited to 1999 and later years.

A related exception to the general retroactive and retrospective effect of case law is where a court issues a 'suspended declaration of invalidity'. This is not common, but it can occur where a law is found to be inconsistent with the written Constitution and the court wishes to allow Parliament (or the relevant provincial legislature) a period of time to enact alternative legislation. This may be done where striking down the offending law with immediate and retroactive effect could 'pose a danger to the public', 'threaten the rule of law', or 'result in the deprivation of benefits from deserving persons'.[71] Suspended declarations of invalidity of tax statutes have been ordered where the court accepted that an immediate and retroactive declaration would result in 'fiscal chaos', as was ordered in *Eurig Estate*.[72] The use of suspended declarations of invalidity by courts has an interesting connection with retroactive tax legislation. In *Kingstreet Investments*, Justice Bastarache for the Court made the following comments [emphasis added]:

68. *Imperial Tobacco*, *supra* note 39, para. 72, citing *In re Spectrum Plus Ltd.* [2005] 2 A.C. 680, [2005] UKHL 41, para. 7.
69. [2007] 1 S.C.R. 429, 2007 SCC 10.
70. Id., paras. 99–107.
71. Id., para. 121.
72. *Eurig Estate*, *supra* note 21.

> 'This appeal concerns whether restitution is available for the recovery of monies collected under legislation that is subsequently declared to be *ultra vires*. For the reasons given below, I find that restitution is generally available.'
> …
> My view is that concerns regarding potential fiscal chaos are best left to Parliament and the legislatures to address, should they choose to do so. Where the state leads evidence before the court establishing a real concern about fiscal chaos, it is open to the court to suspend the declaration of invalidity to enable government to address the issue. In *Eurig*, Major J. suspended a declaration of invalidity for six months. Because, in that case, unconstitutionally levied probate fees were used to defray the costs of court administration in the Province, he expressed concern that an immediate deprivation of this source of revenue might have harmful consequences for the administration of justice. Moreover, this Court's decision in *Air Canada* demonstrates that it will be open to Parliament and to the legislatures to enact valid taxes and apply them retroactively, so as to limit or deny recovery of *ultra vires* taxes. Obviously, such legislation must also be constitutionally sound.[73]

Thus, in Canada, the proceeds of an unconstitutional tax can generally be retained if Parliament or the provincial legislature chooses to enact a revised retroactive tax.

3.4.7. Views in the literature

3.4.7.1. Opinions regarding retroactivity

There is not a great deal of literature regarding retroactive taxation in Canada. Articles written by practitioners tend to criticize all forms of retroactive tax laws, asserting that such laws are inherently unfair to taxpayers and harmful to the integrity of the Canadian tax system.[74] Academic lawyers have analysed whether retroactive tax laws (or other retroactive laws) are subject to scrutiny under the Charter, the Bill of Rights or unwritten constitutional principles. These authors tend to recognize that retroactive legislation is acceptable in areas where there has been an official announcement for taxpayers to rely upon, where there is no issue of taxpayer reliance, where a benefit is being extended, or where it is necessary to stop highly aggressive avoidance schemes that threaten the integrity of the tax system.[75] There is a consistently held view, however, that tax legislation made retroactive prior to any announcement date, possibly to overrule an unfavourable judicial decision, is incompatible with the fundamental requirements of the rule of law.[76] It is felt that such retroactivity should be limited in some way, either ex ante through an official practice in Parliament, or ex post through judicial application of the rule of law.

3.4.7.2. Debate on law and economics view on transition law

This debate is not currently happening in Canada, although the law and economics methodology is influential in other areas. Perhaps the debate in the US will begin to have some influence in the near future.

---

73. *Kingstreet Investments*, *supra* note 9, paras. 12, 25.
74. E.g. J. McCart and B. Morris, 'The Income Tax Conventions Interpretation Act – Unilateral Treaty Amendment?' (Parts I and II), 31 *Canadian Tax Journal* (1983), at p. 1022, 32 *Canadian Tax Journal* (1984), at p. 98; H.J. Kellough, 'The Legislative Process: Legislation by Press Release and the Need for a More Open Process' in: *1998 Conference Report* (Toronto: Canadian Tax Foundation, 1999), p. 3:1.
75. Sherbaniuk, *supra* note 6; Loomer, *supra* note 16, McDonnell, *supra* note 16.
76. Sherbaniuk, *supra* note 6; Loomer, *supra* note 16, McDonnell, *supra* nota 16.

It is implicitly recognized by the authors cited at 3.4.7.1, although the word 'efficiency' is not used, that it is 'efficient' to align a revised law with taxpayer expectations as soon as possible, which may justify having tax legislation made effective from the date of a Budget announcement or other official announcement. The current author is not convinced that making a law retroactive to a time prior to any announcement, such that it could not have been known or relied upon, is welfare-enhancing.

3.5.
Denmark

Aage Michelsen
Jacob Graff Nielsen

3.5.1. Terminology

3.5.1.1. Distinction between retroactivity and retrospectivity

Danish legal theory employs the concept of retroactivity whereas the concept of retrospectivity is not acknowledged as a separate legal concept. However, it seems that the concept of retrospectivity more or less corresponds to the concept of non-actual retroactivity in Danish legal theory.[1] We shall elaborate further on this concept below.

It is important to emphasize that retroactive legislation is not prohibited pursuant to the Danish Constitution. At the same time it must be noted that it is a fundamental legislative principle in Danish law that a statute that toughens the legal status for taxpayers is only given retroactive effect if this is found to be absolutely necessary. The assessment of necessity is based on the legislative reasons for and proportionality of the retroactivity. In effect, it often comes down to a political assessment whether retroactive legislation is deemed necessary. Retroactive tax law statutes occur relatively often in Denmark.

The legal concept of retroactivity[2] corresponds to the Dutch conceptualization: The effective entrance date of one or more provisions of a statute precedes the date on which the statute enters into force. This definition is developed further in Danish legal theory by distinguishing between material and formal retroactivity. Material retroactivity concerns a situation where (provisions of) a statute has legal effect on dispositions or facts that have taken place before the statute enters into force by promulgation. Whereas Dutch legal discourse makes use of the terminology of formal retroactivity in this case, the corresponding Danish concept is material retroactivity. According to Danish legal theory, formal retroactivity occurs when (tax) authorities administer or apply (provisions of) a statute before the statute enters into force.

Consequently, the terminology of Dutch and Danish legal theory differs on use of the terms 'material' and 'formal' retroactivity.

Recently, several cases of formal retroactivity in connection with tax legislation have caused political debate in the Danish parliament (Folketinget). For instance, the Danish Government raised the age limit for last date of payment of capital pensions in connection

1. In Danish: Uægte tilbagevirkende kraft. It is difficult to translate the concept to English. The phrase 'non-actual' is chosen to indicate that this type of retroactivity is in effect not considered retroactive according to Danish legal theory.
2. In Danish: Tilbagevirkende kraft.

with the recent and comprehensive Danish tax reform.[3] Before the statute was put into effect the Minister of Taxation contacted the pension institutes and requested that the institutes administer the new statute by withholding payments of capital pensions regardless of the original age limit until the new bill was passed and had entered into force. The request thus included capital pensions that exceeded the original age limit for payment of capital pensions in the period from the introduction of the bill to the date on which the statute was put into force. This procedure was criticized by political parties that are not members of the Government and the Tax Minister later recalled the request to the pension institutes. The statute includes some quite unusual provisions on the effect of the statute to remedy the effect of this very special procedure that can be considered an example of formal retroactivity.

3.5.1.2. **Conceptual variations**

a. In general

In Danish legal theory it is debated whether it is correct to use the terminology that a statute 'enters into force' retroactively or that a statute 'has retroactive effect'.[4] However, this debate is primarily academic and it is generally accepted that both terms cover the same situation.

Furthermore, Danish legal theory distinguishes between actual and non-actual retroactivity. Whereas actual retroactivity covers the concept of (material) retroactivity as mentioned above, non-actual retroactivity more or less corresponds to the Dutch concept of retrospectivity or material retroactivity. In Danish legal theory, non-actual retroactive legislation refers to the situation where an amendment to a statute or a law reform has effect on past events for the future without grandfathering.

b. Clear distinction between 'retroactivity' and 'retrospectivity'?

The distinction between retroactivity and retrospectivity is not acknowledged in Danish legal theory, but the Danish concepts of actual and non-actual retroactivity resemble the distinction to a great extent. The considerations against actual retroactive legislation are also relevant in the case of non-actual retroactivity, but this type of retroactivity is in fact not considered retroactive. A closer examination of Danish legislative practice reveals that non-actual retroactivity is avoided if at all possible to such an extent that transitional provisions are extensive and very complicated.

Recently, a case of non-actual retroactivity has caused debate in the Danish media.[5] In February 2009 a bill concerning the taxation of stock gains obtained via foreign and non-EU investment institutes was passed.[6] The effect of this amendment was that taxation of gains or losses via foreign and non-EU investment institutes changed from realization taxation to yearly taxation of unrealized gains or losses. The relevant provision had effect from the income year of 2009 while the statute as such came into force on 13 February 2009. This was, of course, actual and material retroactivity. However, the consequence of the change from realization taxation to yearly taxation of unrealized gains or losses from 2009 was that losses accrued before 2009 were not taken into consideration in some instances.

---

3. Spring Tax Reform 2.0 (Forårspakke 2.0), Bill 200, 2008-2009 passed as statute 412 on May 29, 2009. The relevant provisions concerning the age limit of payment of capital pension has effect for capital pensions that have not been taxed at the date on which the statute was put into force (31 May 2009).
4. It is difficult to translate the nuance difference between the Danish terms; enter into force (træde i kraft) and have effect (have virkning). Cf. Peter Germer, *Statsforfatningsret I*, (DJØF Publishers, Copenhagen, 2007), at p. 143.
5. Cf. Morgenavisen Jyllands Posten, *Erhvervsweekend*, Saturday, 20th of June, 2009, at p. 1 and p. 5.
6. Bill 23, 2008-2009, passed as Statute 98 on 2 February 2009.

Thus, the statute did not grandfather accrued but unrealized losses from before the date of entry into force of the statute. This effect was only relevant for investments via a company in foreign non-EU investment institutes. The second aspect of retroactivity of this statute can be compared with the concept of retrospectivity which is called non-actual retroactivity in Danish legal theory. It is worth noting that the Danish Minister of Taxation amended the transitional provision due to the criticism, hereby ensuring that accrued losses are taken into account.[7] This example illustrates the effort the Danish Ministry of Taxation makes to avoid retrospectivity even though retrospectivity is not prohibited pursuant to the Danish Constitution.

c. Relevance of tax period

In some countries, the situation that, during a fiscal year, the income tax rules are changed as from the beginning of the fiscal year is not considered retroactive, the reason being that the income tax obligation only arises at the end of the income year (tax period approach).

In these countries, a conceptual distinction is made between a statute that applies to a previous year (*actual retroactivity*) and a statute that applies as from the beginning of the current year (*de facto retroactivity*).

In Danish legal discourse, the above-mentioned distinction between actual retroactivity and de facto retroactivity is not relevant. For instance, if a tax statute in Denmark enters into force on 1 July 2009 with effect from 1 January 2009 this is simply considered material retroactivity. As a rule, income taxes in Denmark are also assessed on a yearly basis, but the income year for corporations can be staggered. Therefore, income years and fiscal assessment years do not necessarily correspond, which would mean that new tax statutes would be considered retroactive for some corporations with staggered income years while this would not be the case for other corporations. This is assumed to be one of the reasons for not acknowledging the tax period approach in Denmark.

3.5.1.3. **Interpretative statutes**

a. Phenomenon of 'interpretative statutes' explicitly known?

The concept of interpretive statute is not acknowledged in Danish legal theory although statutes that amend and thereby in effect interpret another retroactive statute are not uncommon. The interpretation of statutes does not always require an amendment by a new statute in Denmark and tax law statutes are to a high degree interpreted by the courts or even by rulings from administrative tax authorities. As the Danish interpretational tradition is relatively pragmatic, vagueness and ambiguity can be solved by practice. The Danish Tax Administration (SKAT) issues a large number of administrative notices[8] of an interpretational nature.

If retroactive tax law statutes are amended by another statute with effect from the effective entrance date of the original statute, the latest statute is considered retroactive in a material respect. The necessity of applying retroactive effect to the amendment is considered separately, but in many cases the same criteria that gave reason to the retroactivity of the first statute are also relevant for the (interpretational) amendment.

A specific principle of authentic interpretation has been acknowledged in earlier Danish legal theory, which now is considered obsolete.[9] Authentic interpretation meant

---

7. Statute 1388 promulgated on 21 December 2009 (Bill 55 2009/2010).,
8. In Danish these administrative notices are called: Styresignaler og meddelelser. These notices are published on SKAT's homepage: www.skat.dk.
9. Cf. Poul Andersen, *Forvaltningsret*, 5. ed., (Gyldendal Publishers, Copenhagen, 1965), at p. 28 and Germer, *supra* note 4, at pp. 147-48.

that a new statute could ascribe retroactivity to itself by containing information about the interpretation of a previous statute. According to authentic interpretation, retroactivity was not relevant if the meaning of a previous statute could be clarified by common interpretation principles.

It is now assumed in current legal discourse that authentic interpretation of a retroactive nature requires the same assessment of necessity as retroactive legislation.

Actually, Danish legal discourse does not require a conception of interpretative statutes as retroactivity is not prohibited according to the Danish Constitution. From a Danish perspective it seems that the need for a separate notion of interpretative statutes is based on restrictions on the use of retroactive legislation. Interpretative statutes become a means to allow retroactivity by ascribing an authentic interpretative purpose to the interpretative statute, thus reducing the general objections against retroactivity.

Interpretational problems in connection with tax law statutes are either solved by passing amendments, by court rulings or by changing administrative practice or issuing administrative notices. The distinction between interpretive statutes and other statutes (actual amendments) is not relevant in Danish legal theory. From a Danish perspective it seems quite difficult, if not even impossible, to make such a distinction.

Interpretational clarification of a retroactive statute with a date of effect that corresponds to the retroactive effect of the original statute can only be accomplished by a new retroactive statute.

3.5.1.4. **Validation statutes**

a. Phenomenon of 'validation statutes' known?

It is essential to emphasize that general retroactive changes to administrative tax law practice in a way that is unfavourable to taxpayers is not allowed in Denmark. This was established by the Danish Supreme Court in 1984[10] and has been confirmed in subsequent court rulings, cf. TfS 1984, 138 Ø, TfS 1986, 615 H.

The concept of validation statutes is not acknowledged in Danish legal discourse. Retroactive changes to practice by a validation statute would be considered a worrying approach in Danish law, but the Danish Constitution does not prohibit that the legislator changes practice retroactively. As a consequence, the problem is of a politico-legal character. If the legislator should choose to abandon a favourable practice which has been developed by the courts of law with retroactive effect, this approach could be contrary to the provision on resumption in the Tax Administration Act sec. 25 (1) (7). According to this provision, tax assessments can be reopened in favour of the taxpayer if practice has been overruled by the courts, the National Danish Tax Tribunal or if the tax administration as informed about a change of practice. In these cases, tax assessments concerning the same income year which was relevant in case sub judice can be reopened. It is always, however, at least possible to request reopening of tax assessment concerning income years three years before the passing of the ruling in the first overruling case.

3.5.1.5. **Comparison moment**

Pursuant to sec. 22 of the Danish Constitution, all statues have to be promulgated to be valid and the procedure of promulgation is regulated in the Danish Law Gazette Act.[11] Section 3 of the Danish Law Gazette Act stipulates that statutes come into force at the begin-

10. Cf. UfR 1983.8 H and Aage Michelsen et al., *Lærebog om indkomstskat*, 14. ed., (DJØF Publishers, Copenhagen, 2011), at p. 118.
11. Cf. Consolidated act on Law Gazette no. 608 issued on June 24, 2008 (in Danish: Lovtidendeloven).

ning of the 24-hour period ensuing the 24-hour period in which the statute is published in the Gazette. For instance, if a statute is published in the Gazette on 1 October 2009, the statute comes into effect the exact moment the clock passes midnight between 1 October and 2 October 2009. It is, of course, possible for the parliament to introduce another date and time of effect for a statute including a date and time that is retroactive, but this has to be expressly stipulated in the statute.

It is considered a basic interpretation principle that statutes – as a rule – only have effect on future events and dispositions. As a consequence, it has to be obvious in the provisions concerning the effect of the statute that retroactivity is intended.[12] A disputed example of this interpretation principle contra retroactivity concerns change of provisions in connection with resumption of tax assessment.

UfR 1999.1480 H: This Supreme Court ruling concerns an amendment to the former Tax Administration Act sec. 35. Pursuant to the original phrasing of sec. 35, the Tax Administration could reassume the tax assessment no later than three years after the expiration of the relevant assessment year. This resumption provision was amended by a statute which came into effect on 1 January 1996. According to the new phrasing of sec. 35, the Tax Administration could reassume tax assessment no later than 1 May, the fourth year after the expiration of year which the tax assessment concerned. On 1 April 1996, the Tax Administration gave notice of a resumption of a tax assessment concerning the income year of 1992. This was only possible according to the new phrasing of the Tax Administration Act sec. 35 which came into effect on 1 January 1996. A majority of the Supreme Court judges (3-2) came to the conclusion that the retroactive effect of the amendment was sufficiently indicated in legislative material.[13]

The relevant moment of comparison when establishing whether a statute is retroactive is the time of promulgation or publication of the relevant statute.[14]

3.5.1.6. **Concept of retrospectivity**

a. Definition of retrospectivity

As mentioned above, retrospectivity as a concept does not exist in Danish legal discourse. However, the Danish terminology of non-actual retroactivity seems to cover the same situation as, for instance, the Dutch concept of material retroactivity or retrospectivity. To clarify this further, that Danish terminology operates in three different situations:

- Facta praeterita: Legislation with effect on past events and/or transactions and described as material and actual retroactive.
- Facta futura: Legislation with effect on future events and/or dispositions. This sort of legislation is not considered retroactive in any way.
- Facta pendentia: Legislation with effect on continuous events and/or transactions. This sort of legislation covers events that occur partly before and partly after the point of time when the relevant statute comes into effect.

It is disputed in Danish legal discourse whether the last-mentioned sort of legislation can be considered retroactive at all and the literature concerning non-actual retroactivity is not extensive. Generally, it is concluded that non-actual retroactive legislation involves some of the same challenges for due process protection as (actual) material retroactivity. In connection with tax law statutes it can be considered customary to introduce transitional rules that take into consideration continuous events. If, for instance, an asset that was

12. Cf. UfR 1996.68 H (insufficient indication of retroactivity), UfR 1996.1474 Ø (insufficient indication of retroactivity), UfR 1999.1480 H (sufficient indication of retroactivity).
13. This ruling is criticized by Germer, *supra* note 4, at p. 149.
14. Cf. Germer, *supra* note 4, at p. 148.

exempt from taxation before the introduction of a new statute is covered by capital gains taxation with effect from 1 January 2009, asset value added before the date of effect will normally be exempt from taxation. In this way, non-actual retroactivity is generally avoided.

As actual material retroactivity is allowed by the Danish Constitution, non-actual retroactivity can also occur. Generally, non-actual retroactive tax law statutes require the same assessment of necessity as actual material retroactivity.

b. Examples of retrospectivity

Non-actual retroactivity is discussed above in section 3.5.1.2.

3.5.1.7. **Distinction between substantive and procedural statutes**

a. With respect to the impact of a statute having immediate effect

A distinction between substantive and procedural statutes is not part of Danish legal discourse on retroactivity. However, a case law study indicates that a distinction between procedural retroactivity and substantive statutes can be registered. The case (UfR 1999.1480 H) mentioned in section 3.5.1.5 can be considered an example of a procedural statute with immediate effect. The change of the former Tax Administration Act was disadvantageous to the taxpayer as the amendment allowed resumption of a tax assessment that was not possible pursuant to the former phrasing of the provision at hand. Nonetheless, the Danish Supreme Court allowed the procedural retroactivity as it was found to be the intention of the legislator. The implications of this ruling are disputed.

The Danish High Court came to another conclusion in a case concerning procedural rules on debt collection cf. UfR 1998.1086 Ø. The case concerned a demand for payment that was made before a statute came into effect that changed the requirements for this type of demand. The Danish High Court found that it was unsubstantiated to assume that the demand for payment made before the date of effect of the amendment should meet the requirements of the new statute to form the grounds for an ensuing execution. Though this case does not relate to tax procedure, it might indicate that the Danish interpretational principle contra retroactivity also applies in cases concerning procedural retroactivity.

However, this point of view is contradicted by the Danish Supreme Court in a later case cf. UfR 2000.1682 H. In this case the Supreme Court concluded that if a statute implementing changes in criminal procedure does not contain transitional provisions the statute at hand applies to ongoing criminal cases. It would appear that this case contradicts the High Court ruling referred in UfR 1998.1086 Ø, but it is assumed that it is not possible to generalize from these two cases.[15]

These cases indicate that Danish legal theory and case law are not consistent as regards procedural retroactivity.

b. Rules considered procedural rules

As mentioned, the distinction between substantive and procedural statutes in Denmark is far from consistent and of dubious value in connection with retroactivity. The Danish understanding of procedural rules includes all provisions concerning administrative tax complaints, tax assessment procedure, time limits for filing complaints and resumption, rules regarding evidence and burden of proof. etc.

15. Cf. Germer, *supra* note 4, at p. 147.

3.5.2. Ex ante evaluation of retroactivity

3.5.2.1. Constitutional limitations to retroactivity of tax statutes

As mentioned above in section 3.5.1.1, the Danish Constitution does not impose limitations on the retroactivity of tax statutes. The interpretation principle contra retroactivity implies the existence of a requirement for explicit consent from the legislator to retroactive statutes. This principle could be considered constitutional, but is has not been acknowledged as such in Danish legal discourse.

The fundamental reservations concerning retroactivity in Danish legal theory that is the reason for the assessment of necessity and the interpretation principle contra retroactivity are undoubtedly based on the above-mentioned principles including the principle of legal certainty, the principle of legitimate expectations, the principle of equality and the principle of the rule of law. The nature of these principles is probably considered to be primarily politico-legal rather than constitutional when it comes to retroactivity.

3.5.2.2. Transition policy of government

a. Is there a tax transition policy of government?
The Danish Ministry of Justice has issued Guidance on Legislation Quality[16] that contains a brief account of retroactive legislation.[17] Furthermore, the Ministry of Justice has issued a circular concerning provision on effect and promulgation.[18] None of these two publications contain provisions on transition policy. The Danish Ministry of Taxation has no guidelines or official policy about transitional provisions that are available to the public.

However, it is evident that the Ministry of Taxation puts a lot of effort into drawing up transitional provisions in tax law statutes. As a rule, extra attention is also devoted to transitional provisions in connection with preparatory work on retroactive tax law statutes.

b. Transition policy laid down in a document or an Act
As no official guidelines or policy on transition exist, this question is to a lesser degree relevant to Denmark.

The responsibility regarding transitional provisions is primarily handled by the Ministry of Taxation with assistance from the Ministry of Justice. Due to the considerable attention to transition in connection with tax law statutes, the Danish parliament often includes transition and retroactivity in debates as part of the parliamentary readings. Furthermore, the Committee of Fiscal Affairs often includes an assessment on the date of effect and transitional provisions concerning tax statutes.

In 2006 the Danish Law Gazette Act was amended and according to the legislative history to the amendment it is common legislative practice for statutes to include provisions on the statute's date of effect and transitional matters. It was also concluded in the preparatory material to the amendment that statutes often deviate from the date of effect according to the Danish Law Gazette Act sec. 3.

c. Transition policy with respect to retroactivity and grandfathering
The considerations concerning retroactivity including the assessment of necessity and the criteria that form the basis of this assessment are mentioned above in section 3.5.1.1. No detailed transition policy or guidelines exist.

16. The guidance from June 2005 is available at the Ministry of Justice's homepage: www.jm.dk.
17. Cf. The Ministry of Justice's Guidance on Legislation Quality section 4.3.3.
18. Circular no. 4, 10 January, 1966.

d. Transition policy and favourable retroactive effect
According to Danish legal discourse, retroactive statutes that favour the taxpayers are found all but unproblematic. As a consequence, the assessment of necessity often does not hinder that retroactive tax bills are passed if the bill at hand is favourable to taxpayer.

3.5.2.3. **Ex ante control by an independent body**

In Denmark all ministerial bills pass a consultation process that includes a review by the Ministry of Justice.[19] This review is partly of a legal-technical nature, but the review by the Ministry of Justice also includes constitutional principles, EU law and retroactivity. Ministerial circular 9033 dated 12 November 1998 issued by the Danish Ministry of State contains a memorandum concerning the Ministry of Justice's legal-technical review of bills. It is expressly mentioned in the memorandum that the review covers retroactivity. The review includes the bill's compliance with the Danish Constitution, general legal principles, EU regulations, the European Convention of Human Rights and various Danish legislation. Furthermore, the bill's wording is examined for precision and potential vagueness and the Ministry of Justice also reviews the underlying preparatory work. It is accentuated in the Ministry of Justice's Guidelines on Legislation Quality that bills have to be presented to the ministry as soon as possible in the law-making process.

No clear rules exist concerning the Ministry of Justice's review of ministerial bills besides the Ministry of Justice's Guidelines on Legislation Quality and these guidelines do not contain specific rules to review retroactivity, grandfathering or favourable retroactivity.

As mentioned above, retroactive effect is considered far less problematic if the effect is granted to statutes that are favourable to taxpayers.

3.5.3. **Use of retroactivity in legislative practice**

3.5.3.1. **Legislating by press release**

a. Use of 'legislating by press release'
Promulgation by press release has occurred in Denmark, but not in connection with tax statutes. For instance, statutory intervention by the Government in connection with labour disputes has been published by radio and TV. Pursuant to sec. 6 in statute no. 289 which was passed on 20 May 1987, the statute came into effect at the beginning of 21 May 1987, whereas sec. 5 came into effect immediately. In this instance, the urgency required promulgation by special means. The same model was used in a similar situation, where a collective labour agreement was put into effect immediately by statute no. 317 dated 21 May 1999.

b. Types of situations
One of the best known cases regarding retroactivity is the *Sudden Thaw* case, cf. UfR 1958.955 Ø. The police stopped a transport in the afternoon of 5 March 1956. The restrictions on driving in the sudden thaw period appeared from ministerial order no. 45 dated 3 March 1956, and in which the time of effect was set to be 5 March 1956 at 6 a.m. The contents of the ministerial order were transferred via Ritzau to all daily newspapers while the order was published in the Danish Law Gazette on 7 March. The Danish High Court found that immediate intervention was required and that this substantiated the ministerial order's provisions with regard to the time of effect and the unusual promulgation as necessary means to take care of vital interests.

---

19. Cf. Jens Drejer, 'Lovgivningsprocessen på skatteområdet', in: *Festsskrift til Ole Bjørn*, (DJØF Publishers, Copenhagen, 2004), at pp. 193-94.

Retroactivity by press release is very uncommon in Danish legislative practice other than in legislation in connection with collective agreement negotiations that break down and result in strikes, cf. section 3.1.1.

3.5.3.2. **Retroactive effect further back than first announcement**

a. In general
Retroactive effect that goes back further than the date on which the bill is introduced in the parliament is also very uncommon as regards tax statutes. Statute no. 614 dated 19 December 1984 concerning share sale to holding companies had effect on all share sales in 1984. However, the statute offered the possibility of dispensation which in practice was very lenient when it came to share sales conducted before the date on which the bill was introduced i.e. 4 December 1984.[20]

The normal procedure in recent legislative practice is that tax statutes that are disadvantageous to taxpayers are only given effect from the date of introduction of the bill to the Danish parliament. If the assessment of necessity results in a lack of need for retroactivity, the statute is given effect from the ensuing income year.

b. Influence of retroactive tax statutes
To our knowledge, the situation in which retroactive effect granted to substantive statutes also influences pending legal cases has not occurred.

c. Pending legal proceedings excluded from application retroactivity?
We refer to section 3.5.1.5 and 3.5.1.7. Danish legal discourse is unclear when it comes to procedural retroactivity, but it is commonly accepted that amendment of procedural statutes has effect on pending legal cases unless otherwise stated in the amendment's transitional provisions. As a rule, procedural legislation will always contain transitional provisions, which means that the question about retroactive effect on legal proceedings seldom constitutes a problem.

3.5.3.3. **Favourable retroactivity**

Granting retroactive effect to statutes that are favourable do not occur in a specific pattern, the decisive factor being a political wish to favour taxpayers retroactively. In recent years, favourable retroactivity has been introduced quite often in connection with tax legislation as approximately a quarter of tax law bills contain provisions including favourable retroactivity.

3.5.4. **Ex post evaluation of retroactivity (in case law)**

3.5.4.1. **Testing against the Constitution and legal principles**

Danish legal theory distinguishes between formal and material constitutionality of parliamentary acts.[21] Formal constitutionality concerns the statutes' compliance with constitutional provisions on the statute creation procedure e.g. sec. 22 of the Danish Constitution regarding promulgation of statutes.

Material constitutionality, on the other hand, occurs when the substance of a statute is unconstitutional.

---

20. Cf. Michelsen et al, *supra* note 10, at pp. 109-10.
21. Cf. Germer, *supra* note 4, at pp. 210-216.

Whereas there has not been much debate as to whether the Danish courts of law are competent to test statutes' formal constitutionality,[22] it has been disputed whether the courts were competent to test the material constitutionality of statutes. According to recent constitutional law theory, the Danish courts are competent to test the material constitutionality of statutes based on solid court practice.[23]

Hence, retroactivity is not considered unconstitutional in Danish legal theory and this is why the Danish courts of law are not testing whether a statute's retroactivity is constitutional but instead whether a statute's retroactivity is sufficiently substantiated by the legislator. This means that the Danish principle of interpretation contra retroactivity is applied when the Danish courts test whether retroactivity is in effect the intention of the Danish parliament (Folketinget). In principle, the Danish courts could also test the compliance of retroactive legislation on the basis of sec. 73 in the Danish Constitution. This provision concerns the inviolability of property rights, but it is generally presumed that the provision does not hinder retroactive legislation unless such legislation affects singular taxpayers in a way that constitutes an infringement of property rights.

3.5.4.2. **Examination method**

As retroactivity is allowed according to the Danish Constitution, no specific examination method can be established. A very disproportionate and singular instance of retroactivity could potentially infringe sec. 73 of the Danish Constitution, but this is very unlikely.

3.5.4.3. **Testing against Article 1 of the First Protocol ECHR**

The Danish courts of law are competent to test the compatibility of tax statutes or tax procedure with the ECHR including Article 1 of the First Protocol concerning the protection of private property. The courts have never found a retroactive tax statute incompatible with Article 1 of the First Protocol to the ECHR or the Danish Constitution sec. 73, which as mentioned concerns the inviolability of property rights.

The ECHR is incorporated in Danish law by statute,[24] which means that citizens can complain or take legal action against the Tax Administration with direct reference to the ECHR.

The Danish high courts have established that tax imposition is not incompatible with sec. 73 of the Danish Constitution, cf. UfR 1958.595 V, the reason, on the one hand, being that tax imposition is based on general provisions and, on the other hand, that taxes are paid in cash instead of cession of concrete assets.[25]

3.5.4.4. **Examination method for testing against principle of legal certainty**

The principle of certainty is not acknowledged as a separate legal principle in Danish legal theory, because the understanding of substantive due process of law as a general legal principle in Danish legal discourse contains the aspect of legal certainty. A retroactivity test of a statute by the Danish courts of law does not constitute a validity test based on constitutionality or fundamental legal principles such as the principle of substantive due process.

---

22. Cf. e.g. UfR 1941.1071 H, UfR 1945.570 Ø, UfR 1967.22 H, UfR 1993.321 H and UfR 1994.29 H.
23. Cf. Germer, *supra* note 4, at p. 210, Poul Andersen, *Dansk Statsforfatningsret*, (Gyldendal Publishers, Copenhagen, 1954), at p. 466-69 and Henrik Zahle, *Dansk forfatningsret 2*, 3. ed., (Christian Ejlers Publishers, Copenhagen, 2001), at pp. 157-61.
24. Cf. Consolidated act. no. 750 dated October 19, 1998.
25. Cf. Michelsen et al., *supra* note 10, at p. 109.

3.5.4.5. Interpretations by courts to avoid retroactivity

As a rule, the Danish courts of law enforce a principle of interpretation contra retroactivity which is almost the opposite approach than interpretations that avoid possible retroactive application. However, when the courts of law test the assessment of necessity for retroactivity some instances of a tendency towards leniency have been established. The case mentioned above in section 3.5.1.5 – UfR 1999.1480 H – has been criticized because insufficient substantiation of the amendment's retroactive effect was present in the legislative material to which the court referred. This court ruling is most commonly regarded as an exception that does not constitute general leniency. On the contrary, court practice generally demonstrates that the interpretation principle contra retroactivity is enforced consistently.

3.5.4.6. Reasons for lack of judicial limits to retroactivity

As the Danish Constitution generally does not limit the legislator's possibility of passing retroactive tax law bills, no further explanation for the legislator's competence is considered necessary. The legislative politico-legal principle demonstrated by the assessment of necessity proves that retroactivity is only applied on the basis of careful considerations. Furthermore, the Danish courts of law require interpretational clarity to establish that the legislator has intended retroactivity.

These instruments do not carry the same legal weight as constitutional provisions, but they serve their purpose by limiting the occurrences of retroactive statutes to exceptional cases.

In principle, EU law and Article 1 of the ECHR First Protocol can limit the possibility to issue tax and VAT statutes with retroactive effect and the Danish courts of law would in such a case test the compliance of the relevant Danish legislation with the limits set by these sources of law.

3.5.5. Retroactivity of case law

3.5.5.1. In general

The Danish court system is based on a two-instance principle and as a rule legal proceedings in tax law cases are filed at the city courts as first instance. As a consequence, city court rulings can be appealed to one of the two Danish high courts, but civil law suits including tax cases cannot be appealed to the Danish Supreme Court unless the law suit entails issues of principle.[26]

Rulings from the Danish Supreme Court are relatively uncommon, which is illustrated by the number of cases in 2008. In 2008 16 tax law cases were appealed to the Danish Supreme Court whereas the number of cases in 2007 was 72.

Since the Danish court reform in 2007, the Danish high courts must in fact be considered the final instance in tax law cases.

3.5.5.2. Temporal effect of judicial change of course

The Danish courts do not formulate transitional rules in the case of rulings that abandon existing case law. Transitional provisions in connection with a change of practice concerning income and property taxation are found in the Tax Administration Act. sec. 27 (1) (7). Pursuant

26. Cf. The Administration of Justice Act. sec. 226. Before the comprehensive Danish court reform in 2007, all law suits in tax law cases were filed at the high courts as first instance which meant that all tax law cases could be appealed to the Danish Supreme Court. An extraordinary possibility of third instance dispensation exists.

to this provision, the taxpayer can request a special reopening of a yearly tax statement if existing practice is abandoned by a final administrative decision from the National Danish Tax Tribunal or by a final judgment from the courts of law *if the decision is favourable to the taxpayer*. The provision is also applicable if the Tax Ministry publishes a change of administrative practice *in favour of taxpayers*. In these cases, special resumption of an otherwise closed yearly tax statement is allowed counting from the income year that the overruling decision concerned. Alternately, special resumption is always allowed counting from the income year that began but did not end three years before the year in which the first overruling of practice took place.

If the Danish high court delivers judgment favourable to the taxpayer on 5 November 2009 concerning a tax assessment of the income year of 2003 and the high court judgment affirms the previous city court judgment of 3 November 2007, special resumption can be requested by taxpayers concerning income years from and including 2003.[27]

In these cases the Danish Tax Administration publishes an administrative notice containing information on the resumption options for taxpayers.

Unfavourable judgments or changes of administrative practice only have effect on future decisions and practice including pending and appealed cases.

In addition, a controversial case law practice has developed in Denmark that involves a sort of retroactive effect. In several cases the Danish Tax and Customs Administration has refused to accept decisions from the National Danish Tax Tribunal, which is the final administrative appeals tribunal in Denmark. As a consequence, the Danish Tax and Customs Administration does not adjust administrative practice even though this practice is in conflict with the decision by the National Danish Tax Tribunal. In these instances, the taxpayers cannot support their cases on the basis of the decision by the National Danish Tax Tribunal, which in effect results in retroactivity, if the courts of law assent to this approach in an ensuing judgment.[28]

3.5.6. Views in the literature

3.5.6.1. Opinions regarding retroactivity

The description above in section 3.5.1.1, and subsections corresponds to the general opinion in fiscal and constitutional law literature in Denmark regarding the retroactivity of tax statutes.[29] Retroactive statutes occur in connection with anti-abuse legislation, to avoid hamstering when raising excise duties, but also in connection with legislation to close gaps in tax law. Normally, the retroactive effect is granted from the date on which the bill is introduced in the parliament, but in special circumstances retroactive effect may be counted from an even earlier point of time. However, this is very rare.

3.5.6.2. Debate on law and economics view on transitional law

The law and economics view has not given rise to discussion regarding retroactivity in Danish law and economics theory. Arguments of an economic nature are included as part of the assessment of necessity on which the legislator bases retroactivity. For instance, the risk of the economic effects of hamstering can be the reason for granting retroactivity to a statute on excise taxes.

---

27. It is a precondition that the city court judgment overruled the decision by the administrative Danish National Tax Tribunal. Otherwise, special resumption is allowed counting from and including the income year in which the National Tax Tribunal reached its decision.
28. Cf. Aage Michelsen in *R & R* 2006/9 SM at p. 259 ff. ('Begrænset skattepligt – Luftkaptajner – Retskildehierarki') a comment on the Supreme Court's judgment in SKM 2006.483 H.
29. Cf. the reference to the literature above in section 1.1.

3.6.
Finland

Jukka Mähönen

3.6.1. Terminology

3.6.1.1. Distinction between retroactivity and retrospectivity

There is no statutory distinction between retroactivity and retrospectivity in Finnish law. Because there is only one general concept of retroactivity, a clear distinction between 'retroactivity' and 'retrospectivity' is not made either in law, *travaux preparatoires* or in the legal literature. When the question is addressed, only one concept is used, namely 'retroactivity' (Finnish *taannehtivuus*, Swedish *retroaktivitet*), covering both 'retroactivity' and 'retrospectivity' (as defined in the questionnaire).

3.6.1.2. Relevance of tax period

In both the Finnish *travaux preparatoires* and the legal literature, the concept of retroactivity is always used in the meaning of retroactivity proper as retrospectivity is accepted in Finnish tax law.

3.6.1.3. Interpretative statutes

The Finnish legal system, ''does not recognize the concept of 'interpretative statute' either in the Constitution of Finland of 1999 ('Constitution') or any other general statute. The Constitution does not contain a specific prohibition of interpretative statute, either, as the question has not been raised. Statutes enacted by parliament can also be amended by parliament can be amended by the parliament by adding conceptual clarifications to them. If this kind of amendment has retroactive effect, the amending statute is seen to be retroactive.

3.6.1.4. Validation statutes

The Finnish legal system does not recognize the phenomenon of 'validation statute'. As the judicial powers are exercised by independent courts of law, with the Supreme Court (in private and criminal law cases) and the Supreme Administrative Court (in administrative and tax law cases) as the highest instances,[1] the legislator neither 'validates' nor 'overrules' the judgments of courts by using retroactive legislation. However, retrospective legislation (as defined in the questionnaire) is routinely used either to 'validate' or to 'overrule' the Supreme Administrative Court judgments also in tax cases.

1. Sec. 3(3) of the Constitution.

3.6.1.5. **Comparison moment**

According to sec. 79(3) of the Constitution, a parliamentary statute must indicate the date when it will enter into force. For a special reason, it may be stated in an Act that it is to enter into force by means of a decree issued by the government. If the statute has not been published by the date provided for its entry into force, it enters into force on the date of its publication.

However, a distinction is made between the date of entry into force and the effective date in Finland as well. The effective date is usually a date after the date of entry into force (for instance, the date of entry into force of a statute is 31 December 2010 and statute is applied the first time 1 January 2011). If the effective date is prior to the date of entry into force, the statute is seen to be retroactive by nature.[2]

3.6.1.6. **Concept of retrospectivity**

As mentioned above in section 3.6.1.1, there is no definition of retrospectivity in Finland, either in the law, the *travaux preparatoires* or in the legal literature. For this reason, there is no reason to give hypothetical examples of retrospectivity.

3.6.1.7. **Distinction between substantive and procedural statutes**

A doctrinal distinction between substantive and procedural statutes is not made in Finland. However, Finnish tax statutes are substantive by nature as they apply only to taxable events occurring after the date on which the statute enters into force, not to pending proceedings.

3.6.2. **Ex ante evaluation of retroactivity**

3.6.2.1. **Constitutional limitations to the retroactivity of tax statutes**

According to sec. 81(1) of the Constitution, the state tax is governed by a parliamentary statute, which contains provisions on the grounds for tax liability and the amount of the tax, as well as on the legal remedies available to the persons or entities liable to taxation.

As stated by the Constitutional Law Committee of the Finnish parliament, the highest authority in constitutional matters in Finland, there is no general prohibition of retroactive tax legislation in the Constitution. However, based on the general principles of legitimate expectations and fairness, the Committee recognizes a constitutional duty for the government and the parliament to 'avoid' retroactive tax legislation.[3] However, the rule is not strict so that a retroactive tax statute is constitutional unless expressly otherwise stated by the Committee.

Previously, retroactive legislation was not generally accepted but was criticized based on especially sec. 15(1) of the Constitution, according to which an individual's property is protected. This line of argumentation was denied by the Supreme Administrative Court in 1998[4], as referred to below in section 3.6.2.2.

---

2. See, as an example, Act No. 329/2009 Amending § 20 of the Income Tax Act, entry into force 22 May 2009. The Act was applied for the first time for the tax year 2008, i.e. from the beginning of year 2009. According to the *travaux preparatoires* (Government proposal No. 220/2009), the Act is retroactive.
3. See the Statement of the Constitutional Law Committee of the Finnish parliament No. 1/2009 on the Government Proposal for the Act Amending § 20 of the Income Tax Act.
4. The Finnish Supreme Administrative Court, judgment No. 1998:53.

3.6.2.2. Transition policy of government

As far as *retroactivity* is concerned, the government follows in its proposals the guideline set by the Constitutional Law Committee referred to in section 3.6.2.1 above, vaguely requiring only avoidance of retroactivity but not denying it totally. As far as *courts* are concerned they should review the constitutionality of tax laws independently. Hence, the statements of the Constitutional Law Committee are *not formally* binding in Finnish courts. However, if we recall (i) that the Committee's statements are generally honoured not only by the government but also by the courts themselves (see section 3.6.4.2 below), (ii) that according to sec. 109 of the Constitution, only if, in a matter being tried by a court of law, the application of a statute would be in *evident* conflict with the Constitution, must the court of law give primacy to the provision in the Constitution and (iii) the denial by the Supreme Administrative Court in 1998 of the unconstitutionality of retroactive tax legislation,[5] the possibility that a Finnish court would override a retroactive tax provision as unconstitutional, is purely theoretical and not even that.

As far as *grandfathering* is concerned, this is not an issue since the Supreme Court case of 1998,[6] denying protection of property against grandfathering. However, there is a policy with respect to granting retroactive effect to tax statutes that are *favourable to taxpayers*, although it is not expressly stated. This kind of legislation has been favoured in recent times (see section 3.6.3.4 below) and no questions of retroactivity are raised from the constitutional point of view after the Supreme Administrative Court case.

3.6.2.3. Ex ante control by an independent body

According to sec. 99 of the Constitution, the supreme courts, i.e. the Supreme Court and the Supreme Administrative Court, may submit proposals to the government for the initiation of legislative action but they have not done so as far as retroactive tax legislation is concerned. Sec. 74 of the Constitution is of far greater importance. According to Sec. 74, the Constitutional Law Committee must issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties (foremost the European Convention of Human Rights, ECHR).

As far as retroactivity is concerned, the Committee has set out only the 'avoidance' of retroactivity guideline in its Statement of 2009 referred to above in section 3.6.2.1. The Committee has given no guidelines on grandfathering or on favourable treatment of tax payers so far.

3.6.3. Use of retroactivity in legislative practice

3.6.3.1. Legislating by press release

The Finnish legislator does not make use of 'legislating by press release'.

3.6.3.2. Retroactive effect further back than first announcement

A typical situation of retroactivity is the case in which the parliament grants retroactive effect to a statute from the date when the government proposes a bill to the parliament. It is also possible that the retroactive reaches back to the beginning of the fiscal year.

---

5. The Finnish Supreme Administrative Court, judgment No. 1998:53.
6. The Finnish Supreme Administrative Court, judgment No. 1998:53.

An example: The proposal is given 1 September 2010, the statute is accepted by the parliament on 1 December 2010, the statute enters into force 31 December 2010, and the effective date is 1 January 2010.

However, it never happens that the government will announces publicly that a bill will be proposed in the (near) future and the retroactivity effect is given to the statute from the date of this announcement, i.e. from a prior date to the actual bill.

3.6.3.3. **Pending legal proceedings**

However, as a retroactive effect is granted very seldom and in those cases the government and the parliament act fast, the possibility that pending legal proceedings are influenced is theoretical. Also, the possibility that retroactive effect is granted to substantive statutes as a result of which pending legal proceedings are influenced as well is very theoretical. For these reasons, pending legal proceedings are never excluded from the application of the new statute.

3.6.3.4. **Favourable retroactivity**

Finnish law recognizes retroactive effect to tax statutes that are favourable to taxpayers. A typical situation of this kind is *a tax relief*.[7]

3.6.4. **Ex post evaluation of retroactivity (in case law)**

3.6.4.1. **Testing against the Constitution and legal principles**

The Finnish courts test the retroactivity of a tax statute for compatibility with the Constitution. The leading case is the case mentioned above in section 3.6.2.2, the Supreme Administrative Court case of 1998, referring also to the principle of equality in sec. 6 of the Constitution.

3.6.4.2. **Examination method**

According to Finnish case law, the courts see themselves as being bound in their judicial review to the guidelines set by the Constitutional Committee.[8] As the Committee has not clearly challenged retroactivity on constitutional arguments, it is very unlikely the courts will dare to do it independently (see also section 3.6.2.2 above).

3.6.4.3. **Testing against Article 1 of the First Protocol ECHR**

The Finnish courts test the retroactivity of a tax statute against Article 1 of the First Protocol ECHR. As far as retroactivity is concerned, in the Supreme Administrative Court case of 1998 mentioned above in section 3.6.2.2 this provision was also discussed but in that specific case the Court rejected the taxpayer's arguments on this point.

---

7. See Government Proposal No. 2006/2008 (tax exemption on the sale of timber).
8. Juha Lavapuro, 'Perustuslain 106 § ilmeisyysvaatimuksen vaikutuksista oikeuskäytännössä' [Effects of the 'evident conflict' requirement in section 106 of the Finnish Constitution]. 106 *Lakimies* 4 (2008), at pp. 582–611.

3.6.4.4. Examination method for testing against principle of legal certainty

According to sec. 106 of the Constitution, if, in a matter being tried by a court of law, the application of a statute would be in evident conflict with the Constitution, the court of law must give primacy to the provision in the Constitution. However, this provision is applied very rarely.[9]

3.6.4.5. Interpretations by courts to avoid retroactivity

The reason why sec. 106 of the Constitution is almost never applied is that, according to Finnish constitutional practice, conflicts between the Constitution and statutes must be solved foremost by using a 'constitution-friendly' interpretation of the statute, thus avoiding an open conflict between the Constitution and the statute.

3.6.4.6. Reasons for lack of judicial limits to retroactivity

The reason why the courts rarely recognize limits on the use of retroactivity is the very cautious constitutional interpretation referred to above in section 3.6.4.4.

3.6.5. Retroactivity of case law

According to the Finnish law, a precedent has retroactive effect. As the courts do not specifically discuss the question, the effective date is in many cases unsure, causing legal uncertainty.

3.6.6. Views in the literature

3.6.6.1. Opinions regarding retroactivity

The discussion on the retroactivity of tax statutes is based on the constitutionality of retroactive tax legislation. Prior to the 1998 Supreme Administrative Court ruling referred to above in section 3.6.2.2, there was criticism of retroactivity, based mostly on the protection of property principle.[10] After 1998, retroactivity has been widely accepted both among constitutional and tax scholars.[11]

3.6.6.2. Debate on law and economics view on transitional law

Unlike in other fields of law in which law and economics movement has nowadays great importance (e.g. company law),[12] the Finnish tax literature is methodologically conservative, based mostly on traditional legal dogmas (excluding usage of regulation theory).[13]

---

9. Lavapuro, *supra* note 8.
10. Jukka Mähönen, 'Taannehtivan verolain perustuslainmukaisuudesta' [On constitutionality of a retroactive tax law], 91 *Lakimies* 6 (1993), at pp. 845-860.
11. See Kari S. Tikka, 'Verolakien perustuslainmukaisuuden tutkimisesta tuomioistuimissa' [On judicial review of tax laws in courts], 97 *Lakimies* 6–7 (1999), at pp. 982–994.
12. See Jukka Mähönenand Seppo Villa, *Osakeyhtiö I: Yleiset opit [Company I: General principles]* (Helsinki: WSOYpro, 2006).
13. See Kalle Määttä, *Environmental Taxes: From an Economic idea to a Legal Institution* (Helsinki: Finnish Lawyers' Publishing, 1997); Kalle Määttä, *Veropolitiikka: Teoria ja käytäntö [Tax policy: Theory and practice]*, (Helsinki: Edita, 2007).

3.7.
France

Emmanuel de Crouy-Chanel

3.7.1. Terminology

3.7.1.1. Distinction between 'retroactivity' and 'retrospectivity'

French legal discourse traditionally distinguishes two kinds of retroactivity in tax matters. A statute is considered as being retroactive when it applies to taxes whose taxable event is prior to the promulgation of the new law. This means a law is not truly retroactive when it applies to closed transactions if the taxable event is posterior to the date of promulgation. This situation is common with income tax; the taxable event is the date of the accrual of the income, at the end of the taxable period (31 December, in most situations) while the budget law, modifying the tax law, is frequently promulgated one or two days before. To characterize this situation of material retroactivity, French legal discourse use the term of 'rétroactivité de fait' (de facto retroactivity).

The distinction between the two kinds of retroactivity is not always clearly made, notably by non-specialists and most of the general papers on the subject begin by the presentation of the distinction. This could be the reason why the term of 'rétrospectivité' (retrospectivity) has begun to be used more frequently since the middle of the 90s[1] to qualify the material retroactivity.

3.7.1.2. Relevance of tax period

As seen above, the key point for determining retroactivity is the date of the taxable event. The law (including case law) does not distinguish between a non-retroactive statute applying to a past fact, an on-going fact, or a future fact. Income tax is only an example. The significant point here is the paramount importance given by French law to the notion of taxable event (*fait générateur*). This legal position is not welcomed by taxpayers who demand predictability of the tax consequences of their decisions, even if the related taxable event is posterior.

3.7.1.3. Interpretative statutes

The category 'interpretative statute' (*loi interpretative*) is well-known in French law-making, notably in tax matters. It is an application to tax law of the general principle of retroactivity, as construed by the courts. In the interpretative statute, the lawmaker only clarifies what his intention has always been. The interpretative statute is supposed therefore to bring nothing

1. Conseil des Impôts, *13ème rapport au Président de la République, Fiscalité et vie des entreprises*, (Paris: Imprimerie des journaux officiels, 1994), I, at p. 346; F. Douet, 'les lois fiscales rétrospectives', *Les Petites Affiches* 128 (1996), at p. 5.

new that was not in the interpreted statute from the beginning, and to be, therefore, not retroactive. In a way, it is an empty statute – which, of course, is a kind of juridical fiction. To characterize 'interpretative' statutes that truly modify the meaning of the initial statute, French legal discourse uses the term of 'falsely interpretative statute' (*loi faussement interprétative*). These statutes are retroactive and are therefore subject to constitutional and legal limitations.

The courts need therefore to determine whether the 'interpretative statute' is actually 'interpretative'. An interpretative statute should be only declaratory, i.e. contain no new legal content. In practice (because a retroactive statute is more limited than an interpretative statute), the court will firstly look for the overt intention of the legislator (how did he characterize the statute?). This is of course not always sufficient (the legislator may have characterized as interpretative what is actually a retroactive statute). So far, the Council of State (*Conseil d'Etat)*, the administrative supreme court, does not look further that the displayed intention[2] and refuses to requalify an 'interpretative' statute. But the Court of Cassation (*Cour de cassation*), the judiciary supreme court, does examine whether the statute is really 'interpretative'; if not, it will be construed as retroactive[3].

One of the problems with the interpretative statute is that tax authorities use it (and require it from the legislator) in order to confirm their interpretation of the law in a pending dispute. As such, interpretative statutes are even more useful than true retroactive statutes. Firstly, they are not subject to the same constitutional limitations. Secondly, an interpretative statute is supposed to clarify the law as it has always been, and the interpretation such as given will be followed by the *juge de cassation*, while a retroactive statute does not apply to a court decision that has become final on the merits and therefore will not be used by the *juge de cassation* to rule on a decision of a court of appeal.

3.7.1.4. **Validation statutes**

Validation statutes responding to a judicial decision are quite common in French law, but a distinction has to be made between the true 'validation statute' (*loi de validation*), whose explicit aim is to give a legislative basis to an administrative decision (i.e. from the tax authorities) which would be, without this basis contrary to the law, and the more insidious phenomenon of validation of a legal practice through a retroactive statute (often an interpretative statute).

The true 'validation statute' is explicitly intended as such by the legislator, is pursuing a general interest and is defining the decision which is validated by obtaining a legislative basis[4]. Indirect validation aims to change the law applicable to a dispute pending before a court in order to prevent the annulment of the decision.

3.7.1.5. **Comparison moment**

The date of entry into force of a statute is normally the day after the publication of the statute in the Official Gazette (*Journal officiel*)[5], but the legislator may specify a later date of entry into force. This date of entry into force (*date d'entrée en vigueur)*, always posterior to

2. CE, 7 July 1989, Assembly, avis, no. 106 284, *Compagnie financière et industrielle des autoroutes (Cofiroute).*
3. Cass. com. 7 April 1992, no. 89-20418, *Mme Pavie.* In this decision, the court held that the statute was not interpretative as it led to new tax conditions being substituted for those arising from the statute allegedly interpreted.
4. E.g. the institutional act validating property tax on buildings in French Polynesia, no. 2002-161, of 11 February 2002, gave a legal basis to property taxes on buildings perceived in French Polynesia. These taxes were illegal because their assessment had been made between 1992 and 1999 without any legal basis and between 1999 and 2001 according to an illegal administrative statute.
5. Civil Code, Article 1, as modified by Ordnance no. 2004-164 of 20 February 2004.

the promulgation, must be distinguished from the date of application of the statute which may be in the past. A statute is retroactive if its date of application is before its date of entry into force.

3.7.1.6. **Concept of retrospectivity**

The concept of retrospectivity is ill-defined in French tax law. A law that applies to past facts with future effects would be considered retrospective or 'de facto retroactive', but no distinction is clearly made yet between certain future effects, possible future effects or potential future effects. Notably, the civil law theory of grandfather rights (*droits acquis*) has never been applied by the courts to substantive tax statutes.

3.7.1.7. **Distinction between substantive and procedural statutes**

A distinction is made in France between substantive and procedural statutes, regarding the date of application.

The law founding the right to claim is the law existing at the time of the entry into force of the decision to tax (i.e.: if this decision takes the form of a tax claim (*rôle*), date of the tax collection; if the tax is spontaneously paid, date of payment). Therefore, a substantive statute will not be immediately applicable.

A procedural statute is, on the other hand, generally immediately applicable. But if the rule has an effect on the consistency of the tax obligation, an immediate application would give it a retroactive effect, which is forbidden by the law[6]. For example, the court, if the statute does not formally state otherwise, will not give immediate effect to rules regarding evidence if they are linked to a substantive rule[7].

3.7.2. **Ex ante evaluation of retroactivity**

3.7.2.1. **In general**

The French Constitution imposes some limitations on the retroactivity of the tax statutes. The *Conseil constitutionnel* has progressively recognized some constitutional limitations to the use of retroactive tax statutes. The difficulty is that there is no provision in the Constitution explicitly prohibiting the retroactivity of law (beside penal law), and especially not in tax matters where retroactive legislation is frequently used. Therefore, the law may be retroactive, notably in tax matters, and the *Conseil constitutionnel*, initially, had few restrictions, if any[8].

But, shortly afterwards, the *Conseil constitutionnel* reminded the legislator that it was free to pass retroactive law, provided that two constitutional limits were respected: the principle of non-retroactivity of the punitive law (which we will not develop here, as the tax

---

6. E.g. CE section 13 December 1991, no. 65.940-66.868, Société ASET. The problem was the law applicable to the procedure followed for establishing the decision to tax. To prevent the retroactive effect, the court decided that the law applicable is the law at the date of the decision to tax. But the procedure may require prior formalities, and the law may have been modified between the date of the formality and the date of the decision to tax. The principle therefore has various exceptions.
7. Cass. com. 7 November 1989, 88-15282, *Verne*; CE 12 March 1980, no. 15169.
8. Cons. const. no. 80-126 DC, 30 December 1980, *Loi de finances pour 1981*; Cons. const. no. 84-184 DC, 29 December 1985, *Loi de finances pour 1985*: no principle or provision at the constitutional level prohibits a tax provision to be retroactive ('aucun principe ou règle de valeur constitutionnelle ne s'oppose à ce qu'une disposition fiscale ait un caractère rétroactif').

law, as such, is not a punitive law), and respect for the binding force of a judicial decision[9]. Respecting the binding force of a judicial decision was, afterwards, linked to Article 16 of the Declaration of the Human and Civic Rights of 1789 which mentions the necessity of 'guaranteeing rights' and of the 'separation of powers'. Its interpretation was extended[10].

Beside those absolute prohibitions, the *Conseil constitutionnel* required, from 1986, the retroactive act to intervene on grounds of general interest (*pour des raisons d'intérêt général*)[11]. The admission of a general interest became more and more restrictive, with the development of a control of proportionality (*intérêt général suffisant*[12]: a financial interest alone, no[13]; threat to the continuation of the tax and justice services, yes[14]). Three conditions of validity of the retroactive law are connected with this control of proportionality: a) the statute must pursue an aim of sufficient general interest; b) the statute may not infringe a constitutional rule or principle, if the aim of general interest pursued is not itself of constitutional value; c) the scope of the validation statute must be strictly defined[15].

Eventually, the *Conseil constitutionnel* considered that the requirement of sufficient grounds of general interest was also derived from the principle of guarantee of rights of Article 16 of the Declaration of the Human and Civic Rights of 1789[16], prohibiting, according to the last case law of the *Conseil constitutionnel,* infringement of a legally obtained position (*situation légalement acquise*) without sufficient grounds of general interest[17]. Without actually using the term, the case law of the *Conseil constitutionnel* limited the retroactivity of the law by the principle of legal certainty, construed from the 'guarantee of rights' of Article 16 of the Declaration.

The idea of introducing to the Constitution a new provision prohibiting explicitly the retroactivity of the law, especially in tax matters, is often put forward[18].

3.7.2.2. **Transition policy of government**

There are no defined rules for the transition between the old and the new law. But, as the legislator has a quite wide freedom, notably regarding retrospectivity, taxpayers complain about a lack of legal certainty. In the last years, the government has been a bit more prudent in the introduction of new tax statutes, with prior consultation of the professionals, transition periods, entry into force delayed…, but we are very far from an explicit and published transition policy.

---

9. Cons. const. 86-223 DC, 29 December 1986, *Loi de finances rectificative pour 1986,* about the validation of illegal taxation; followed, in tax matters, by Cass. 21 December 1990, ass. plén., no. 88-15744, *Royal*, and CE 27 October 1995, no. 150703, *min. du logement c/ Mattio.*
10. Cons. const. 2005-531 DC, 29 December 2005, *Loi de finances rectificative pour 2005*: unconstitutionality of an act depriving a judicial decision of its effect, here the right to deduct the VAT on motorway tolls (ECJ, aff. C 276/97, 12 September 2000, *Commission c/ France* and CE 29 June 2005, no. 268681, *SA Établissements Louis Mazet et al.*).
11. Cons. const. 86-223 DC, 29 December 1986, *Loi de finances rectificative pour 1986.*
12. Cons. const. 98-404 DC, 18 December 1998, *Loi de financement de la sécurité sociale pour 1999.*
13. Cons. const. 98-404 DC, 18 December 1998, *Loi de financement de la sécurité sociale pour 1999.*
14. Cons. const. 2002-458 DC, 7 February 2002, *Loi organique portent validation de l'impôt foncier sur les propriétés bâties en Polynésie française.*
15. Cons. const. 2002-458 DC, 7 February 2002, *Loi organique portent validation de l'impôt foncier sur les propriétés bâties en Polynésie française.*
16. Cons. const. 2002-458 DC, implicitly; 2005-530 DC, 29 December 2005, *Loi de finances pour 2006.*
17. Cons. const. 2005-530 DC, 29 December 2005, *Loi de finances pour 2006*; 2009-599 DC, 29 December 2009, *Loi de finances pour 2010.*
18. The situation was a bit tense when the government decided in 2004 to modify the rules on the taxation of life insurance savings. The last example of a proposition to introduce in the Constitution a provision explicitly prohibiting retroactivity in tax matters was in 2008, during the parliamentary discussion of a major rehauling of the Constitution of 1958.

In November 2004, the government presented 30 measures to improve relations between taxpayers and tax authorities; one of these was a formal pledge to stop using, in tax matters, retroactive provisions detrimental for the taxpayer. This release is not legally binding, and has had little influence on parliamentary debate. It is difficult to ascertain whether it marks a deep change in legislative practice.

For example, according to the government's pledge, incentive tax measures would in the future be limited to five years, but are guaranteed during that time period. Since 2004, many important incentive tax measures were adopted without the five-year time limit, so it seems we should not be over-optimistic about the solidity of the government's pledge.

It is probable that some instances, such as the *Conseil d'Etat*, which controls and advises the government on every legislative proposal, have developed rules in reviewing retroactivity, but the advices of the *Conseil d'Etat* are not published and it is difficult to ascertain whether it promotes a 'transition policy'.

3.7.3. Use of retroactivity in legislative practice

3.7.3.1. Legislating by press release

Legislating by press release is used in France but is not sufficiently identified as a legislative practice to have received a name. It is mainly used in cases of anti-abuse legislation or to prevent announcement effects in the case of policy change. It is also used when the new tax provision is supposed to be an incentive and the government hopes to get effects of its policy from the date of the announcement. See for an interesting example, the retroactivity of the tax credit on interest on loans for home buying of 6 May 2007[19], date of the election of the President of the Republic, giving credibility to a political promise.

3.7.3.2. Retroactive effect further back than first announcement

The retroactive period may reach further back in the past than the date of the press release. This is, for example, always the case for validation statutes.

3.7.3.3. Pending legal proceedings

Retroactivity is often used to influence the outcome of pending legal procedures (see validation statutes). Due to constitutional limits, the statute usually provides explicitly that it does not apply to any contradictory court decisions that have become final on the merits. But final means finished legal proceedings, not pending. The validation statute (directly or indirectly) will therefore be applied by the court of appeal[20]

3.7.3.4. Favourable retroactivity

Retroactive effects are frequently granted to tax statutes favourable to taxpayers, especially when the tax benefit is supposed to be an incentive. Retroactivity is, in these cases, linked with legislation by press release.

---

19. Loi no. 2007-1822, 24 December 2007, Budget law for 2008, Article 13, following the decision of the Conseil constitutionnel no. 2007-555 DC, 16 August 2007, *Loi en faveur du travail, de l'emploi et du pouvoir d'achat (TEPA).*
20. But not by the Supreme Court, deciding on the law. However, when the Conseil d'Etat quashes a judgment, it may chose to retain the case, and will, when deciding on it, apply the retroactive statute.

3.7.4. Ex post evaluation of retroactivity (in case law)

3.7.4.1. Testing against the Constitution and legal principles

Until this year, it was impossible for the courts to test the retroactivity of a tax statute for compatibility with the Constitution. The revision of the Constitution of 2008, effective from 1 March 2010, has granted the right for the citizens to challenge an already published law as being contrary to the freedoms guaranteed by the Constitution. The pertinence of the claim is verified by the supreme courts, and the question is answered by the Conseil constitutionnel (*question prioritaire de constitutionnalité* or QPC). Some QPC concerning the constitutionality of retroactive statutes have already been answered by the *Conseil constitutionnel*[21], which has confirmed its case law on the conditions of validity of a retroactive statute.

3.7.4.2. Examination method

3.7.4.3. Testing against Article 1 of the First Protocol ECHR

The retroactivity of a tax statute may be tested by the French courts against Article 1 of the First Protocol ECHR[22]. Some administrative courts have found, in cases regarding Article 59 of the Finance Act of 30 December 2003 (interpretative act about the basis of the *taxe professionnelle*) that the taxpayers claiming the reimbursement of their tax had, in the circumstances, a legitimate expectation amounting to a 'possession' within the meaning of Article 1 of Protocol No. 1, that the retroactive act deprived them of this possession, and that it was not by reason of the general interest (French administrative courts do not require 'pressing' reasons of general interest)[23]. The reasons of general interest invoked by the government (confirmation of the administrative interpretation, repartition of the tax burden, financial consequences) were not deemed sufficient.

The *Conseil d'Etat* has not yet ruled on this point, but has considered that when a retroactive law enters into force shortly (i.e. six months) after a court decision upon which the claimant founded its expectation, the time is too short to give birth to a legitimate expectation amounting to a 'possession'[24].

3.7.4.4. Examination method for testing against principle of legal certainty

The protection of legitimate expectations and legal certainty, as Community law principles, are applied by the courts only in situations pertaining to the application of Community law

21. For an example of a tax statute, Cons. const. 2010-53 QPC, 14 October 2010, *Société Plombinoise de Casino.*
22. CE 8 mars 2002 no. 211327 & 211328, *BNP* (validation statute).
23. CAA Nancy, 28 January 2008, 06-1362, *Sté Mécanique Automobile de l'Est*; CAA Paris, 26 November 2008, no. 07-999, *SA Automobiles Citroën*; CAA Nantes, 1 December 2008, 07-3306, *SNC Peugeot Citroën Rennes*.
24. CE, 19 November 2008, no. 292948, *SA Getecom*. In the case, the retroactive law was prompted by a judgment in favour of a taxpayer. The lack of a legitimate expectation is therefore not only due to the shortness of the period between the judgment and the retroactive law (six months), but also to the fact that a French taxpayer could not reasonably have expected that the legislator (i.e. the tax authorities) would not react to an embarassing court decision.

(i.e. VAT)[25]. They may serve as references for the interpretation of national provisions, in order to prevent conflict with EC law[26].

Recently, administrative courts have begun to link legal certainty with the Constitution[27], but I have not found examples of its application in tax matters.

3.7.4.5. **Interpretations by courts to avoid retroactivity**

It is very difficult for the French courts to use interpretations that avoid what might be retroactive applications because retroactivity must be explicitly provided for by the statute.

3.7.5. **Retroactivity of case law**

3.7.5.1. **Temporal effect of judicial change of course**

The idea that a judgment, which is supposed to be an interpretation of what the law has always been, may have a retroactive effect, or require a transitional period, is quite new to French courts. Prospective overruling has recently been adopted by the Supreme Administrative Court[28] and has not yet received application in tax matters.

3.7.6. **Views in the literature**

3.7.6.1. **Opinions regarding retroactivity**

There is no consensus on situations where to grant retroactive effect to tax statutes would be in any case justified or unjustified. The main opinion is that the legislator too easily uses retroactivity in tax matters (prompting proposals for a constitutional limitation), but that retroactivity is nevertheless necessary to prevent undue use of a procedural gap (validation statute to prevent a 'windfall effect' (*effet d'aubaine*)), and normal practice for policy changes in favour of the taxpayer (legislation by press release). For some recent proposals, see the report of O. Fouquet to the Ministry of the Budget, 'improving the legal certainty between tax authority and the taxpayers', June 2008.

3.7.6.2. **Debate on law and economics view on transitional law**

The law and economics view has had little impact on the legal debate about tax retroactivity. It is sometimes noted that the legislator must have a greater freedom to modify tax statutes, without being hampered by grand-fathering obligations, in order to achieve a better adaptation of the tax law to economic circumstances, but these considerations are far less relevant than constitutional or European principles. In other words, the debate is about retroactivity, not retrospectivity.

---

25. CE 30 November 1994 no. 128516, *SCI Résidence Dauphine*.
26. CAA Bordeaux 16 January 2006 no. 02-955, *Marchesseau*; in this case, prohibition of a retroactive contestation by the tax authorities of a VAT option. See also CE 16 November 2005 no. 265179, *Société Métallurgique du Rhin*: a Council decision prorogating, with retroactive application, a derogation rule is not an infringement of a legitimate expectation as it could be expected, on the contrary, that the derogation rule would be prorogated.
27. CE, ass., 24 March 2006, no. 288460, *Société KPMG*.
28. CE, ass. 11 May 2004, no. 255886 to 255892, *Association AC!*; CE 16 July 2007, ass., no. 291545, *Société Topic Travaux signalisation*.

3.8.
Germany

Johanna Hey

3.8.1. Introduction

The practice of retroactive tax legislation in Germany is considerably influenced by extensive case law provided by the German Constitutional Court. Since the first decisions on retroactivity in the 1960s tax legislation has been the main area in which this court practice has developed.

For almost 50 years the Constitutional Court practice on retroactive tax legislation has been quite steady. However, very recently the Court significantly changed its approach to retrospectivity. In three judgments of 7 July 2010 the Court strengthened the position of the taxpayer[1]. Due to several requests for constitutional review of German fiscal courts and some constitutional complaints by individual taxpayers the judges at the Constitutional Court also granted protection against changes which are considered to have only retrospective effect. This new development is not yet reflected in the academic debate, yet will probably affect it to a considerable extent.

3.8.2. Terminology in Germany

3.8.2.1. Distinction between retroactivity and retrospectivity

Based on the case law of the Constitutional Court, the prevailing German doctrine sharply distinguishes between retroactivity and retrospectivity as two quite differently conceived categories[2]. In terms of terminology, retroactivity is called "real' or 'true' retroactivity ('*echte Rückwirkung*' or '*Rückbewirkung von Rechtsfolgen*'[3]); retrospectivity is called 'pseudo' retroactivity (*unechte Rückwirkung*, '*tatbestandliche Rückanknüpfung*[4]').

A statute is considered to have retroactive effect when it applies to transactions/cases which have been closed before promulgation of the new law. In this case the new statute alters legal effects produced prior to its existence. In contrast to this, retrospectivity exists if

1. Judgment of the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG), reference number 2 BvL 14/02 of 7 July 2010, www.bverfg.de/entscheidungen/ls20100707_2bvl001402.html; reference number 2 BvL 1/03 of 7 July 2010, www.bverfg.de/entscheidungen/ls20100707_2bvl000103.html; reference number 2 BvR 748/05 of 7 July 2010, www.bverfg.de/entscheidungen/rs20100707_2bvr074805.html.
2. Since judgment of the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) of 31 May 1960, Decisions of the Constitutional Court (Entscheidungen des Bundesverfassungsgerichts, *BVerfGE*) 11, at p. 139 (145-146).
3. This terminology is used since judgment of the Federal Constitutional Court of 14 May 1986, *BVerfGE* 72, at p. 200 (242), by the Second Senate of the Federal Constitutional Court, but does not have a different meaning.
4. Terminology of the Second Senate of the Federal Constitutional Court (see supra footnote 3).

the new statute applies to transactions/economic activities which have begun in the past but are not yet concluded[5].

In the past the attribution to one of the two categories was of eminent importance, because it pre-determined the outcome whether the statute was held to be unconstitutional or not (see in detail below section 3.8.4.2). That was because the Constitutional Court classifies retroactive laws in principle as prohibited, whereas laws with only retrospective effect are in general permitted. There were only a very few judgments where in the case of mere retrospectivity the Constitutional Court nevertheless held a law unconstitutional for the reason of violation of the appellant's legitimate trust in the continuity of legislation. But these cases had been decided in other fields, not in tax law. Up to 2010 there was not a single case of a solely retrospective tax statute being abrogated by the Constitutional Court. This situation changed due to three judgments of 7 July 2010. Here, the Constitutional Court acknowledged for the first time that under certain conditions the taxpayer's confidence needs to be protected against mere retrospective changes of the tax law as well and abrogated on these grounds several retrospective changes (see in detail below section 3.8.4.2).

The tax literature is divided; some authors promote a uniform concept of retroactivity[6] mainly to avoid the pre-determination which is the result of the sharp line drawn between (true) retroactivity and retrospectivity (pseudo retroactivity) by the Constitutional Court. However, most authors want to adhere to the distinction[7], even though many criticize the outcome of court practice in cases of retrospectivity. But the fear is that if the distinction between (true) retroactivity and retrospectivity (pseudo retroactivity) is given up, one could no longer rely on the relatively predictable results of the ban of (true) retroactivity as a general principle.

The ultimate problem is to determine the moment the transaction/taxable activity is closed, so amendments/new tax obligations after this date have to be considered retroactive. The difficulties can be illustrated by the reform of the capital gains taxation in Germany in 1999[8], which led to several requests for constitutional review[9] and constitutional complaints, which were decided on 7 July 2010[10].

With Tax Relief Act 1999/2000/2002 (Steuerentlastungsgesetz) the legislator extended the deadline in which capital gains from real estate sales are taxed from two to ten years. The bill was adopted in parliament on 4 March 1999, and published on 31 March

---

5. E.g. judgments of the Federal Constitutional Court of 31 May 1960, *BVerfGE* 11, at p. 139 (146); of 19 July 1967, *BVerfGE* 22, at p. 241 (248); of 20 June 1978, *BVerfGE* 48, at p. 403 (415).
6. E.g. Dieter Birk, 'Steuerrecht und Verfassungsrecht – Eine Analyse ausgewählter Entscheidungen des Bundesverfassungsgerichts und des Bundesfinanzhofs zu verfassungsrechtlichen Grenzen der Besteuerung', *Die Verwaltung* (DV), Vol. 35, p. 91 ff, at pp. 109, 111; Joachim Lang, 'Verfassungsrechtliche Zulässigkeit rückwirkender Steuergesetze', *Die Wirtschaftsprüfung* (WPg.) (1998), pp. 163 ff.; Monika Jachmann, 'Zur verfassungsrechtlichen Zulässigkeit rückwirkender Steuergesetze', *Thüringer Verwaltungsblätter* (ThVBl.) (1999), pp. 269 ff.; Johanna Hey, *Steuerplanungssicherheit als Rechtsproblem* (Cologne: Dr. Otto Schmidt Verlag, 2002), at p. 247 and to other concepts in literature at pp. 233-239.
7. See e.g. Klaus-Dieter Drüen, 'Rechtsschutz gegen rückwirkende Gesetze – eine Zwischenbilanz', *Steuer und Wirtschaft* (StuW) (2006), at pp. 358-365; Roman Seer & Klaus Dieter Drüen, 'Der rückwirkende Steuerzugriff auf private Veräußerungsgewinne bei hergestellten Gebäuden auf dem verfassungsrechtlichen Prüfstand', *Finanzrundschau* (FR) (2006), at p. 661 (668).
8. By Tax Relief Act (Steuerentlastungsgesetz) 1999/2000/2002 of 24 March 1999, Federal Law Gazette I 1999, at p. 402.
9. Request of the Fiscal Court of Cologne of 25 July 2002, reference number 13 K 460/01, *Entscheidungen der Finanzgerichte* (*EFG*) 2002, at p. 1236; request of the Fiscal Court of Cologne of 24 August 2005, reference number 14 K 6187/04, www.fg-koeln.nrw.de; request of the Supreme Tax Court (Bundesfinanzhof) of 16 December 2003, reference number IX R 46/02, *Federal Tax Gazette II* 2004, at p. 284.
10. See footnote 1.

1999. Nevertheless, the extended holding period applied to all sales concluded after 31 December 1998.

One could argue that up to the moment of buying the property – let's say on 30 June 1995 – the taxpayer reckoned with the chance of selling the property any time after 30 June 1997 (after the two-year speculative holding period) without any fiscal consequences. That was possibly the reason why he decided to make a real estate investment. However, nobody would consider the taxable event at this moment as already fully closed.

So what is the critical date? After which point does the taxpayer deserve protection of his confidence in the existing legal situation? The moment when the former two-year holding period expired[11]? The moment he concluded the contract to sell the property? The moment he received the sales price from the buyer? Or the moment when the annual tax obligation of the tax period, in which he sold the property, arose (= the end of the fiscal year)?

In its judgment *2 BvL 14/02* of 7 July 2010[12] the Constitutional Court deemed the expiration of the two-year speculative holding period crucial. From this moment the taxpayer could expect that his position of being able to sell the property tax-free would be respected by the tax legislator.

3.8.2.2. The relevance of the tax period for the distinction between retroactivity and retrospectivity

In this context, one of the biggest controversies between the Constitutional Court and the tax literature as well as the fiscal courts is the relevance of the accrual of the tax obligation by the end of the year.

In as early as 1961 in one of its first judgments on retroactivity in tax law[13], the Constitutional Court invented a tax period-related concept for the distinction between retroactivity and retrospectivity (known as '*Veranlagungszeitraumrechtsprechung*'). Due to the fact that the tax obligation of all period-related taxes (especially personal/corporate income tax, value added tax) arises only at the end of the year, the Court concluded that a tax case is not closed until the end of the year, because the legal consequences are still open. Therefore, insofar as the new statute is promulgated before 31 December, it is considered to be only retrospective, even if it applies from 1 January of the current year. Only if the new law also claims application for previous years is it conceived to be retroactive.

In a leading decision of 14 May 1986[14] the Constitutional Court reaffirmed its case law. This was caused by a request for constitutional review of the Supreme Tax Court[15], which had challenged the formal view of the tax period-related distinction between retroactivity and retrospectivity.

German tax literature opposes this view almost unanimously (see below section 3.8.7). The main argument against the tax period-related distinction between retroactivity and retrospectivity is that the accrual of the tax obligation at the end of the year is of a merely technical character, but provides no insight as to whether the relevant taxable event had taken place before. The taxpayer deserves legal certainty about the tax consequences the moment he performs transactions (known as '*dispositionsbezogener Rückwirkungsbegriff*').

---

11. So Dieter Birk & Egmont Kulosa, 'Verfassungsrechtliche Aspekte des Steuerentlastungsgesetzes 1999/2000/2002', *Finanzrundschau* (FR) (1999), at p. 433 (438); contra, Supreme Tax Court of 16 December 2003 reference number IX R 46/02, Federal Tax Gazette II 2004, at p. 284.
12. See footnote 1.
13. Federal Constitutional Court Judgment of 19 December 1961, reference number 2 BvL 6/59, *BVerfGE* 13, p. 261.
14. Federal Constitutional Court Judgment of 14 May 1986, reference number 2 BvL 2/83, *BVerfGE* 72, p. 200.
15. Request of the Supreme Tax Court of 3 November 1982, reference number I R 3/79, *Federal Tax Gazette II* 1983, p. 259.

In its famous decision on the abolishment of tax subsidies for shipbuilding investments of 3 December 1997[16], the Constitutional Court accepted for the first time that there are transactions which are fully closed before the end of the fiscal year. However, it limited its decision to tax subsidies, holding that here the taxpayer in particular depends on the reliability of the tax legislation.

The German Supreme Tax Court, in line with the tax literature, held in a request for constitutional review of 2 August 2006 that this view also needs to be applied to regular tax provisions[17], with the only aim of producing revenue, because they often influence the behaviour of the taxpayer in the same way as tax incentives. Therefore, the taxpayer needs to know the tax consequences of his economic operations at the time he is undertaking them.

In its answer to this request the Constitutional Court did not alter its distinction between retroactivity and retrospectivity. In the judgments of 7 July 2010 the Court adhered to the tax period concept[18]. In the above example (see section 3.8.2.1) concerning the extension of the holding period for tax-free capital gains on real estate, it characterized the change as only being retrospective even to the extent it applied to transactions concluded between 1 January 1999, and 31 March 1999, the date of the promulgation of the Tax Relief Act 1999/2000/2002. However, at the same time – and this *is* a major change – the distinction between retroactivity and retrospectivity became less important because the Constitutional Court postulated protection against retrospective changes as well. Therefore, the tax period-concept probably will lose relevance.

It will be interesting to observe how this change in the Court's practice will affect the legislator's behaviour. In the past the German tax legislator made excessive use of the tax period concept. Very often tax statutes were enacted hastily at the end of December to allow them to enter into force for the whole fiscal year starting from 1 January. The legislator applied the period-related concept of the Constitutional Court even for inheritance tax, despite the fact that the inheritance tax claim accrues upon the event of the succession, and not only at the end of the year[19]. So far the legislator could feel safe in doing so, because changes within the tax period for the whole fiscal year always passed the review by the Constitutional Court without any special burden of justification. In the future, according to the judgments of 7 July 2010 the tax legislator needs to provide a special justification if he wants to apply a change retrospectively from 1 January if the law is enacted later in that particular year.

3.8.2.3. **Interpretative statutes: legislative purpose of clarification**

There is no special category of 'interpretative statutes' in German law-making. A technical term like 'interpretative statutes' is unknown.

---

16. Judgment of the Federal Constitutional Court of 3 December 1997, reference number 2 BvR 882/97, *BVerfGE* 97, at p. 67; see for detailed reviews of this decision Johanna Hey, 'Die rückwirkende Abschaffung der Sonderabschreibung auf Schiffsbeteiligungen', *Betriebs-Berater* (BB) 1998, at p. 1444; Anna Leisner, 'Vertrauen in staatliches Handeln – ein unkalkulierbares Risiko?', *Steuer und Wirtschaft* (StuW) (1998), at p. 254; Rolf Schmidt, 'Abbau der einkommensteuerlichen Förderung von Handelsschiffen verfassungsgemäß', *Der Betrieb* (DB) (1998), at p. 1199.
17. Supreme Tax Court of 2 August 2006, reference number XI R 34/02, *Federal Tax Gazette II* 2006, at p. 887; as well Supreme Tax Court of 16 December 2003, reference number IX R 46/02, *Federal Tax Gazette II* 2004, at p. 284 (291 ff.).
18. See Judgment of the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG), reference number 2 BvL 14/02 of 7 July 2010, http://www.bverfg.de/entscheidungen/ls20100707_2bvl001402.html, para. 62; see also the answer to the request of the Bundesfinanzhof of 2 August 2006, reference number 2 BvL 1/03 /footnote 1) para. 70.
19. Inheritance tax reform 1996 with Annual Tax Act 1996, *Federal Law Gazette I* 1997, at p. 378, adopted in parliament December 20, 1996; promulgated February 27, 1997, effective from January 1, 1996.

However, the legislator often claims that an amendment of an existing provision has the purpose of eradicating doubts about the correct interpretation of the legal wording ('*Klarstellungsinteresse*'). These 'clarification' provisions are often enacted with retroactivity, sometimes applicable to all pending cases (tax assessments which are not yet final and conclusive).

In general, these statutes have to be considered retroactive, when the new wording has to be applied earlier than entry into force[20]. Only in cases in which the 'clarification' statute would have an exclusively declaratory effect, could it be considered to be not retroactive, because it does not change the legal situation. Nonetheless, often these so-called clarifications in fact lead to a significant tightening of the prevailing legal situation.

In the legal history of an amendment one finds usually only a broad-brush indication of the legislative intent of 'clarification', which does not allow the distinction between an merely declaratory and a constitutive amendment. The identification of a merely interpretative statute is, of course, deeply intermingled with the dogmatic approach to the boundaries of interpretation of tax codes in the light of the principle of legality[21]. To be only interpretative the new law would need to stay within the constitutional limits of interpretation of the previous wording. It might deviate from the interpretation given by the Supreme Tax Court; nevertheless, still has to be compatible with the wording of the tax statute as it was so far. This is often questionable.

Furthermore, it is important to distinguish changes in tax statutes with the legislative intent of closing loopholes ('*Lückenfüllung*'). Here, the wording is too narrow, either because of a mistake of the legislator or because of new tax planning constructions which came up after implementation of the original statute. In this case the intended fiscal result cannot be reached by interpretation (of course, the problem is closely related to the controversy of the legitimacy and scope of 'economic interpretation' and analogy in tax law).

In both situations, the legitimacy of a retroactive entrance into force is not fully resolved. There are some decisions where the Constitutional Court accepted retroactive legislation if the existing law was unclear and confusing[22]. However, this exception to the ban of retroactivity dates back to the early period of court practice. It was developed to allow the legislator to overcome flaws of the legal system in the post-war situation[23]. In more recent decisions it has no longer been applied.

3.8.2.4. **'Validation Statutes' ('Nichtanwendungsgesetze')**

Validation of the Supreme Tax Court's judicial decisions has become quite a frequent phenomenon[24]. Such *Nichtanwendungsgesetze* are often but not always enacted with retroactive effect. Especially if the legislator intends to overrule a change of the prevailing court practice the validation statute often is enacted with effect from the date of publication of the

---

20. On this see at length Johanna Hey, 'Vertrauen in das fehlerhafte Steuergesetz', *Deutsche Steuerjuristische Gesellschaft* (DStJG), Vol. 27 (2004), at p. 91.
21. See Frans Vanistendael in: Victor Thuronyi, ed., *Tax Law Design and Drafting*, Vol. 1 (Washington D.C.: International Monetary Fund, 1996) Chapter 2, at pp. 23-24 on the dogmatic approach to interpretation in Germany.
22. Judgment of the Federal Constitutional Court of May 4, 1960, reference number 1 BvL 17/57, *BVerfGE* 11, at p. 64 (72) ; of March 23, 1971, reference number 2 BvL 2/66, *BVerfGE* 30, at p. 367 (388); of January 17, 1979, reference number 1 BvR 446, 1174/77, *BVerfGE* 50, at p.177 (194).
23. See Gerhard Leibholz, Hans-Justus Rinck and Dieter Hesselberger, *Grundgesetz für die Bundesrepublik Deutschland* (Cologne: Dr. Otto Schmidt Verlag), Article 20 GG, marginal note 1637.
24. See also Wolfgang Spindler, *Liber amicorum for H. O. Solms* (Berlin: E. Schmidt Verlag, 2005) at p. 53; Wolfgang Spindler, 'Der Nichtanwendungserlass im Steuerrecht', *Deutsches Steuerrecht* (DStR) (2007), at pp. 1061-1066, president of the Supreme Tax Court, analyzing the increasing number of judicial decisions, most of them in favor of the taxpayer, which are overruled – either by a circular or by a tax statute.

Supreme Tax Court's new judgment. In this case, the validation statute is often initiated by a circular of the Ministry of Finance (known as '*Nichtanwendungserlass*'), stating that the new judgment will – except for the actual decided case – not be applied in general. This is done to prevent taxpayers from developing confidence in the new court practice.

In around 90% of the cases the validation will concern cases where the Supreme Tax Court has decided/changed its case law in favour of the taxpayer. This already gives evidence that validation legislation normally does not have the purpose of correcting a miscarriage of judgment, but is for mere fiscal reasons. This is important because it means that in most of the cases we are not dealing merely with a (different) interpretation of the prevailing statutes but with an aggravation.

Whether in these cases an exception to the ban on true retroactivity applies as well is not entirely clear. In a recent judgment of the Constitutional Court[25], it was argued that insofar as the Ministry of Finance announces immediately after publication of the new rule that the legislator will intervene, the taxpayer is not able to build up sufficient confidence in the new case law. Therefore, he does not need and cannot expect protection against retroactive validation.

The tax literature criticizes the practice of validation in general if it is done solely for revenue reasons[26]; it is even more opposed to the retroactive enactment of such legislation[27].

3.8.2.5. **Relation between the date of publication and the date of entry into force**

Conditio sine qua non for the entry into force of a statute is the publication in the Federal Law Gazette (see Article 82 para. 1 sentence 1 of the German Constitution). Without publication the law does not come into existence.

Hence, the date of effectiveness has to be distinguished from the date of publication. Normally statutes contain a special provision stipulating a date of effectiveness. It can be the date of publication. However, often this is a date in the future, such as 1 January of the following year, or 30 June, to create a clear and easy cut between the old and the new law. If this date of effectiveness is before the date of publication the law will be considered (truly) retroactive. Thus, in general the date of publication in the Federal Law Gazette marks the distinction between (true) retroactivity and retrospectivity.

But keep in mind that this general rule is derogated by the so far prevailing court practice of period-related distinction between retroactivity and retrospectivity in tax law (see above section 3.8.2). Accordingly, it does not even need a special provision to make the new statute applicable for the whole current fiscal year. It is sufficient to change the law by 31 December, because that means that the tax obligation will accrue as a result of the new law, according to the statutes in existence at the end of the tax period. To exclude transactions concluded before, the legislator would need to formulate transitional rules, saying e.g. that the new rule applies only for transactions after the date of adoption or the date of publication of the new law.

---

25. Judgment of the Federal Constitutional Court of May, 12, 2009, reference number 2 BvL 1/100, Vol.123, at p. 111 (May 12, 2009), reference number 2 BvL 1/00 and BFH/NV 2009, at p. 1382; also before Judgment of January 23, 1990, *BVerfGE* 81, at p. 228 (239).
26. See with many references Joachim Lang, in: Tipke/Lang, *Steuerrecht*, 20th ed. (Cologne: Dr. Otto Schmidt Verlag, 2010), § 5 marginal note 29-30.
27. E.g. Johanna Hey, *Steuerplanungssicherheit als Rechtsproblem*, (Cologne: Dr. Otto Schmidt Verlag, 2002), at pp. 327-329.

3.8.2.6. **Concept of retrospectivity**

Retrospectivity is a much more open concept than retroactivity. One could argue that almost every new statute affects economic activities which have been started in the past. The distinction between retrospectivity and mere future effects can again be illustrated by the recent reforms of capital gains taxation (see above section 3.8.1):

The 9th Senate of the Supreme Tax Court asked for constitutional review in a case where a taxpayer sold property only *after* publication of the extension of the holding period for tax-free capital gains by the Tax Relief Act 1999/2000/2002, although he knew that under the new law he was no longer able to sell the real estate without paying capital gains tax. However, the referring Senate argued that the new rule had retrospective effect, because it did not exclude property which was acquired before it came into force[28]. In weighing the interest of the legislator in changing the law against the taxpayer's interest in protection of his confidence the Supreme Tax Court gave priority to the latter.

The Constitutional Court (judgment *2 BvL 14/02*)[29] followed the request of the Supreme Tax Court because it did not consider the date of the sale of the property to be relevant, but the fact that the two-year holding period had expired before the law prolonged it to ten years. The requirement of the longer holding period to increases in value which had accrued before the new law was published was considered a violation of the taxpayer's legitimate expectations.

In contrast, the abolishment of the tax exemption for capital gains from shares by the Business Tax Reform Act 2008 was clearly not retrospective. The full taxation of capital gains had already been adopted on 14 August 2007[30], but is applicable only to capital gains from shares which have been *acquired* after 31 December 2008.

Less clear is whether the change from the old shareholder-related thin capitalization rule in sec. 8a of the Corporate Income Tax Act to the new general interest deduction ceiling has retrospective effect. It was also adopted by the Business Tax Reform Act 2008 of 14 August 2007 and applies – in case the fiscal year equals the calendar year[31] – to interest paid from 1 January 2008. Most authors argue that it has no retrospective effect, because it became effective only for future business expenses[32]. In contrast, one could consider it retrospective because it applies to existing loans, which often cannot be adjusted to the new fiscal situation quickly enough.

3.8.2.7. **No categorical distinction between substantive and procedural statutes**

In general, no distinction is made between the (retroactive) enforcement of substantive and procedural statutes. New procedural provisions principally apply also to pending cases, where the taxable event occurred in the past. However, unlike substantive statutes the tax period-related distinction between retroactivity and retrospectivity cannot be applied. Due

---

28. Request for constitutional review of 16 December 2003, reference number IX R 46/02, *Federal Tax Gazette II* 2004, pp. 284 ff. The taxpayer had bought the real estate in 1990, and sold it on 22 April 1999. That was three weeks after the legislator had promulgated the extention of the necessary holding period from two to ten years on 31 March 1999.
29. See footnote 1.
30. Business Tax Act Reform (Unternehmensteuerreformgesetz) 2008 v. 14. 8. 2007, *Federal Law Gazette I* 2007, at p. 1912.
31. If the fiscal year diverges from the calendar year, it applies already for all fiscal years beginning after 25 May 2007 (day of the adoption of the bill in parliament), and not ending before 1 January 2008 (Sec. 52 para. 12 d sentence 1 EStG). This is a quite common technique used for diverging fiscal years.
32. See e.g. Christian Hick, in: Herrmann/Heuer/Raupach, EStG/KStG-commentary, § 4h EStG Anm. J 07-3.

to the general principle that a law may not impose an impossible obligation, a new procedural statute cannot stipulate duties to cooperate with respect to the past.

3.8.3. Ex ante evaluation of retroactivity

3.8.3.1. Constitutional limitations to retroactivity of tax laws

Only for criminal laws does the German constitution contain an explicit *ex post facto* (Article 103 para. 2 of the German Constitution). It cannot be analogously applied to retroactive tax provisions[33].

In tax law the German Constitutional Court bases the principle of non-retroactivity on the rule of law (Article 20 para. 3 of the German Constitution). It derives from the rule of law the principle of legal certainty and the principle of protection of legitimate expectations (confidence principle, principle of public trust = '*Vertrauensschutzprinzip*'). For limitations on retrospectivity the Court also refers to the constitutional guarantees of personal freedoms as long as the ban of (true) retroactivity is based on the concept of the rule of law. The ability-to-pay principle is not used.

3.8.3.2. Transition policy of the legislator

Within the constitutional margins the legislator is free in the design of the transition between old and new law. There are neither official nor unofficial guidelines on the transition policy. Surprisingly enough, the Ministry of Finance, who is drafting the tax bills in Germany, also does not apply a general guideline internally to the design of transitional law. Hence, it is decided case by case.

This lack of standardization creates a lack of certainty in itself, because the design of the transition from old to new law for the taxpayer is hard to predict.

The legislator normally, but not always, stays within the broad lines drawn by the Constitutional Court (see sections 3.8.2.1-4 and 3.8.4.2), especially by making use of the tax period-related distinction between principally allowed retrospectivity and in general forbidden retroactivity.

Retroactive effect is – as discussed above (see section 3.8.2.4) – regularly granted to 'validation statutes'.

Furthermore, the date of first application is very often – if not assigned to 1 January – accelerated from the date of publication to the date of the parliamentary decision (due to the case law of the German Constitutional Court, which allows the legislator to go back to the adoption of the bill in parliament even though it is considered to be a true retroactivity, see also below section 3.8.4.1). The reason for this common practice of retroactivity is to prevent taxpayers with the knowledge of the intended abolishment of a tax advantage trying to make extensive use of the (old) more favourable rule before the new statute actually comes into force (so-called 'announcement effects').

The *grandfathering policy* of the German tax legislator appears to be quite arbitrary. Only in some standard situations can recurring patterns be identified. For example, in the case of a change of amortization rules, acquisitions done in the past are normally excluded, whereby the cut-off date is often not the date of the publication of the new statute, but the adoption of the bill in parliament or even earlier (e.g. the date when the bill was proposed). Contrary to this, in the case of new restrictions to the offsetting losses, there is no pattern conceivable. In the majority of cases they apply also to losses which already occurred in the

33. Prevailing opinion, see e.g. Klaus Tipke, *Die Steuerrechtsordnung*, Vol. 1, 2nd. ed., (Cologne: Dr. Otto Schmidt Verlag, 2000), at p. 147.

past, but sometimes loss-producing activities carried out before the new statute was adopted are excluded. The different treatment cannot be traced back to the legislative purpose, e.g. anti-abuse legislation.

In recent years a tendency to more generous grandfathering by the legislator is seen. This might be a reaction to the many requests for constitutional review by the Supreme Tax Court, calling for stricter standards than in the past. This can be proved again by the example of the reform of capital gains taxation in 1999 and 2009. Whilst the extension of the periods in which private capital gains are taxed in the Tax Relief Act 1999/2000/2002 has been granted without any grandfathering, even with real retroactivity (see above section 3.8.2.2), the abolishment of the tax-free capital gains from shares by the Business Tax Reform 2008 applies only to shares *acquired* after 31 December 2008. Shares acquired before this deadline will remain without any time limitation under the old regime, meaning that they can be sold tax exempt after a holding period of one year.

It will be interesting to observe if and how the judgments of 7 July 2010[34] change the legislator's transition policy. The Constitutional Court made it very clear that the tax legislator needs *special* reasons for retrospective legislation to overcome the taxpayer's confidence.

3.8.3.3. **No ex ante control by an independent body**

An *ex ante* evaluation of possible infringements of the Constitution by an independent body is unknown in Germany. The parliament can ask advice from its academic service (*Wissenschaftlicher Dienst des Bundestages*). However, this instrument is hardly ever used. Sometimes also the Federal Council (*Bundesrat*) issues a caveat regarding single provisions even though in the end it gives its required consent to the bill.

3.8.4. Use of retroactivity in legislative practice

3.8.4.1. **The role of adoption of the bill in parliament**

Very often the tax legislator provides retroactivity till the date of the adoption of the bill in parliament – regardless whether there has been a special press release making the parliamentary adoption public. Even though this practice is considered to be truly retroactive, the Constitutional Court considers it justified, without asking for special reasons of justification.

The rationale behind this court practice is that from the date of adoption of the new statute in parliament the taxpayer can no longer trust the continuity of the prevailing legal situation. In the general legal literature this exception to the principle of non-retroactivity is hardly questioned anymore.

Nonetheless, it is necessary to query this practice. Most tax statutes in Germany need the consent of the Federal Council; otherwise they fail. For this reason the adoption of a bill in parliament is only a first step. Especially if the political majorities in the Federal Parliament and the Federal Council are divergent it is doubtful whether the bill will be accepted and, if so, with which content. It can take weeks to some months until the fate of the bill is sealed. For the taxpayer this creates the unpleasant situation that he can neither trust in the still-prevailing legal norms nor in the announced changes.

For this reason the tax literature opposes the practice of retroactivity until the adoption of the bill in parliament. The main reason for this opposition is the special feature of a tax law, whereby the consent of the Federal Council is required in order for it to be

34. See footnote 1.

adopted[35]. This could lead to an approach where the tax legislator is allowed to go back to the date of the consent in the Federal Council.

The 11th Senate of the Supreme Tax Court in a request for constitutional review of 2 August 2006[36] challenged the Constitutional Court practice in an even more fundamental way. The requesting Senate insisted that the earliest constitutionally valid date for enforcement is the date of promulgation in the Federal Law Gazette. Deviation from this date would *always* require a *special* justification apart from the fact that the taxpayer might have previously gained knowledge from the adoption of the bill in parliament. The Senate emphasized the fact that formal publication of new statutes in the constitutionally provided organ of publication is a very important characteristic of a state under the rule of law. For good reasons the Constitution provides *only one* organ for publication as an essential requirement for a statute to come into existence. It is not reasonable to demand that the taxpayer to take note of an emerging new statute from other sources, which do not have the same reliability as the Federal Law Gazette.

In its answer to the request of the Supreme Tax Court the Constitutional Court[37] basically reiterated its position that the taxpayer's confidence in the prevailing legal situation is abating with the progress of the legislative procedure. Already after the tabling of a new bill the taxpayer needs to be aware of the change. The Constitutional Court refers to the taxpayer's responsibility to take precautions, e.g. to negotiate adjustment clauses. Furthermore, it can be required that the taxpayer take legal advice to shelter from negative effects of retrospective changes of the law.

3.8.4.2. **Retroactive application from first announcement**

The legal relevance of media reports about amendments of tax laws is also a highly controversial topic in Germany. There is no standardized practice of publishing changes of the tax code ahead of the formal law-making procedure. Sometimes upcoming changes of the tax law will be announced by an official press release of the Cabinet or the Ministry of Finance. Besides official announcements, plans to abolish tax subsidies or to impose higher tax burdens are often communicated by private media even before the legislative procedure starts, just on the basis of rumours and 'insider' information.

According to the case law of the Constitutional Court, which does not differentiate between the quality of the announcement (official press release or any other kind of media coverage), announcements are relevant in order to prove whether the trust of the taxpayer in the existing law is reasonable or not. Thereby the Constitutional Court makes a distinction between merely retrospective laws and retroactive laws[38]. Whilst it considers press reports to weaken the trust of the taxpayer in retrospective statutes, it used to be permanent court practice that the earliest moment the taxpayer has to envisage a retroactive enforcement of a statute is the adoption of the bill in parliament (see above section 3.8.4.1). However, in its shipbuilding subsidy decision of December 1997 the Court[39] seems to modify its practice, holding that if there is a risk of harmful distortions because taxpayers make excessive use of a subsidy before its abolishment, then the legislator is justified in enacting the statute with retroactivity until the press release.

---

35. E.g. Wolfgang Hoffmann-Riem, 'Rückwirkende Besteuerung der Bodenveräußerungsgewinne von Landwirten', *Deutsches Steuerrecht* (DStR) (1971), at p. 3 (4).
36. Supreme Tax Court of 2 August 2006, reference number XI R 34/02, *Federal Tax Gazette II* 2006, at p. 887.
37. Judgment reference number 2 BvL 1/03 of 7 July 2010 (see footnote 1), para. 74.
38. See comprehensively Johanna Hey, *Steuerplanungssicherheit als Rechtsproblem*, (Cologne: Dr. Otto Schmidt Verlag, 2002), at pp. 319-326.
39. Judgment of the Federal Constitutional Court of 3 December 1997, reference number 2 BvR 882/97, *BVerfGE* 97, at p. 67 (81).

The decision on the abolishment of fiscal shipbuilding subsidies had an even more special twist, because the Court had to decide about a situation, where the Cabinet on 25 April 1996 had announced that the subsidy would be abolished for contracts concluded after 30 April 1996. In the end, the legislator went back to the date of the cabinet decision, excluding – contrary to his announcements – contracts concluded between 25 April and 30 April. This clearly contravened the principle of good faith. However, the Constitutional Court sustained the tax statute at issue, accepting the legislator's intent to stop the run in shipbuilding investment which had occurred after the announcement by not increasing the existing overcapacity of cargo ships.

3.8.4.3. **Retroactivity and pending cases**

If a statute is enacted with unlimited retroactivity, then it applies to any pending procedure. Pending cases are normally not excluded from the application of the new statute.

This problem in particular occurs in cases of validation legislation (see section 3.8.2.4), where the legislator overrules a favourable decision of the Supreme Tax Court. Taxpayers who expected the favourable decision and who undertook legal action in parallel cases will not be able to benefit from the favourable change in the case law, if it is immediately overruled with retroactivity[40].

3.8.4.4. **Retroactivity in favour of the taxpayer**

In principle, the legislator is free to grant retroactive effect to tax statutes which are favourable to taxpayers. On the one hand, there are no constitutional restrictions. On the other hand, favourable changes with retroactive effect are rather rare. One of the reasons for the retroactivity of a favourable change might be to make up for a long political debate or a protracted legislative procedure. For example, some of the tax reliefs implemented to help business enterprises in the ongoing financial crisis have been adopted with retroactive effect.

If it is unclear whether a change will affect the taxpayer's situation positively or negatively (*double-edged changes*), the legislator sometimes makes the new law eligible for a transitional period, to be applied also for the past.

3.8.5. **Ex post evaluation of retroactivity**

3.8.5.1. **Control by the Constitutional Court**

Germany has a very effective system of *ex-post* control of legislative acts in order to protect taxpayers against unconstitutional taxation.

The capacity to dismiss a tax statute for infringement of the Constitution is exclusively with the Federal Constitutional Court. But there are different ways to take a matter to the Constitutional Court. Every German Court can ask for constitutional review by the Constitutional Court if it has doubts whether the law in question for a certain case is compatible with the Constitution. Hence, the taxpayer can already ask for presentation to the Constitutional Court at the lower tax court. Recently tax courts have been very active in presenting issues of retroactivity/retrospectivity to the Constitutional Court.

---

40. See e.g. the legislative answer to a change if the Supreme Tax Court's practice on joint ventures for local business tax purposes, in detail Paul Kirchhof and Arndt Raupach, 'Die Unzulässigkeit einer rückwirkenden gesetzlichen Änderung der Mehrmütterorganschaft', *Der Betrieb* (DB), Beilage 1 No. 22, (2001), pp. 1-18.

However, in case neither the lower court nor the Supreme Tax Court has constitutional doubts, then – after exhaustion of the recourse to the regular courts – the taxpayer himself can file an individual constitutional complaint claiming that the retroactivity/retrospectivity infringes the rule of law or the principle of public trust.

3.8.5.2. **Standards applied to retroactive/retrospective tax statutes by courts**

The history of the control of retroactivity by the Constitutional Court and the tax courts can be roughly characterized as follows:

The court practice of the Constitutional Court has been quite stable for around 50 years, even though it has continually been subject to profound criticism not only in the legal literature but also from the tax courts. In the 1980s the Supreme Tax Court attempted by a preliminary ruling to change the reasoning of the Constitutional Court regarding the tax period-related distinction between retroactivity and retrospectivity (see section 3.8.2.2)[41] – without success[42]. For the next 20 years the tax courts were resigned and just accepted the case law of the Constitutional Court. Then, in its judgment of 3 December 1997 the Constitutional Court indicated a possible change of its prevailing practice. This decision was the starting point not only for a lively discussion in the tax literature, but also for numerous new requests for constitutional review by the tax courts, questioning many of the rules set up by the permanent practice of the Constitutional Court. The material the tax courts could present to the Constitutional Court was enormous because in the late 1990s the tax legislator had often adopted retroactive tax statutes.

Most of the recent requests for constitutional review and individual constitutional complaints were decided in the judgments of 7 July 2010[43]. These judgments are very multifarious. They basically confirmed the prevailing court practice on the distinction between retroactivity and retrospectivity, but caused a sensation by changing the appraisal of retrospectivity.

This background is helpful for understanding differences between the court practice of the Constitutional Court and the tax courts, namely the Supreme Tax Court, though in the end only the court practice of the Constitutional Court is of interest, because the tax courts have no power to declare a retroactive tax statute invalid.

Because of the importance of the case law of the Constitutional Court as a guideline for legislative practice, most aspects have been discussed above. Here I will summarize them to give a compact overview:

Applying the described methods of distinction between retroactivity and retrospectivity (see above section 3.8.2.1 and 3.8.2.2) the Constitutional Court has held, in principle, that there is a ban of retroactivity, whilst retrospectivity – at least in the past – was generally accepted.

However, the principle of non-retroactivity does not apply absolutely, however, but allows important exceptions, which can basically be assigned to two underlying ideas:

a) A reasonable taxpayer cannot claim trust in the (still) prevailing legal situation. This is supposed to justify retroactive enactment
   - from the date of adoption of the bill in parliament (see discussion above section 3.8.4.1);
   - in the case of an evidentially unclear or unconstitutional legal situation.

---

41. Request of the Supreme Tax Court of 3 November 1982, reference number I R 3/79, *Federal Tax Gazette II* 1983, p. 259.
42. See rejection of the view of the Supreme Tax Court by the Federal Constitutional Court judgment of 14 May 1986, reference number 2 BvL 2/83, *BVerfGE* 72, p. 200.
43. See footnote 1.

– This exception has hardly ever been used. It was invented to overcome the transitional period after the Second World War, thus in a situation where the legal system needed a full reorganization. The difficulty of this ground of justification is that the flaw in the law has to be evident for a 'normal' taxpayer.

b) The confidence in the prevailing legal situation has to be subordinated to the interest of the legislator to change the law retroactively. This applies if
– the disadvantage the taxpayer suffers from the retroactive enactment is negligible.
– this de minimis rule is merely an outcome of the principle of proportionality.
– the legislator can claim overriding urgent/compelling public interest.

It is common understanding that mere public revenue interests are not sufficient to justify retroactive tax laws. Nevertheless, the reason of compelling public interest implies a wide latitude in argumentation. So far, the Constitutional Court has never used it as the only ground of justification, but has combined it with facts which shook the taxpayer's faith. This is particularly true of the legislative intent to combat announcement effects[44].

Retrospectivity is held unconstitutional only if the taxpayer can claim that his interest in continuity of the legal situation outweighs the public interest in changing the law. In the past, this requirement was very hard to meet, because the Constitutional Court in the balancing progress only took into consideration *the change as such*, and not a change with a sufficient grandfathering rule. In the judgments of 7 July 2010 the Constitutional Court sharpened the requirements for justification. As of now the legislator needs to prove a special urgency for the change to justify its application also to investments/economic activities started in the past. It is not enough that the change as such is justified (e.g. closing loopholes, abolishment of unjustified tax subsidies), but rather a special reason has to be provided why it has to be applied with retrospectivity. The breach of confidence must be *necessary* to foster the aim of the law. The mere aim to collect more revenue by application without grandfathering is not suitable to surmount the taxpayer's legitimate expectations. In the end there is an open process of the weighing of interests, but the legislator must observe the limits of reasonableness.

3.8.5.3. Test of retroactivity against Article 1 of the First Protocol to the European Convention of Human Rights (ECHR)

To my knowledge there has been no court decision where a retroactive statute has been tested against Article 1 of the First Protocol to the European Convention of Human Rights (ECHR).

3.8.5.4. Retroactivity of Acts of Parliament and subordinate legislation

The German Constitutional Court understands retroactivity mainly as a problem of the rule of law. The rule of law has two aspects, one of which is objective (the principle of legal certainty) and one expressing individual rights (the principle of public trust; confidence principle). The structure of the test against this principle of public trust is the following:

a) Sufficient basis for confidence
b) Confidence
c) Worthiness of being protected

Retroactive subordinate legislation would be tested in the same way as statutory tax laws. The taxpayer can claim to rely on subordinate legislation in the same way as on parliamentarian tax statutes.

---

44. See Judgment of the Federal Constitutional Court of 3 December 1997, reference number 2 BvR 882/97, *BVerfGE* 97, at p. 67 (81 ff.).

In contrast, resolutions of parliament as such have no immediate binding force on the taxpayer. Hence, they are not object of the protection of public trust. This causes the problem that the taxpayer – it is said to destroy his confidence in the still prevailing legal situation – cannot claim that he trusted in a resolution of parliament like the adoption of a bill as such if in the end the bill fails in the Federal Council.

3.8.5.5. **Avoiding unconstitutional retroactivity by interpretation**

Tax statutes have to be interpreted in conformity with the Constitution[45]. Not only the courts but also the tax authorities are required to interpret each statute in a way that avoids infringements of the constitutional principles of legal certainty and public trust. Constitutional interpretation has – in the margins of the wording – priority over the dismissal of a statute as unconstitutional. Hence, in the case law of the Supreme Tax Court transitional rules are interpreted in accordance to the principle of public trust.

3.8.5.6. **Self-discipline of the legislator**

Especially in the late 1990s the tax legislator pushed the limits set out by the Constitutional Court. He seemed to feel free to increase the tax burdens with retroactivity for the current fiscal year. This gave rise to numerous requests for constitutional review and constitutional complaints, which lead to the sharpening of the Constitutional Court's practice in its judgments of 7 July 2010.

On the other hand, there are fields where in the past the tax legislator was quite generous. This is particularly true for changes of depreciation rates or methods. Normally the new less favourable depreciation rule applies only to new acquisitions. Sometimes these transitional rules are in themselves retroactive in the sense that the deadline is a date before publication of the new depreciation rule, often the date of adoption in parliament, but they do not apply to assets acquired in previous years.

In contrast, if the tax legislator limits the fiscal effects of accruals it usually stipulates not only restrictions for the future set-up of accruals, but also requires the liquidation of accruals set-up in the past in the current or the following taxable years.

3.8.6. **Retroactivity of Case Law**

3.8.6.1. **Transition practice of the Supreme Tax Court in cases of a change of the existing case law**

Legitimacy versus necessity of transitional rules in the case of a change of the case law is a matter of quite some controversy in the academic literature[46].

This might be the reason why the practice of the Supreme Tax Court is not uniform at all:

– Sometimes the Supreme Tax Court itself formulates a transitional rule. This happened recently when the Grand Senate of the Supreme Tax Court changed its longstanding

---

45. See Klaus-Dieter Drüen, in: Tipke/Kruse, *Abgabenordung/Finanzgerichtsordnung* (Cologne: Dr. Otto Schmidt Verlag), § 4 AO marginal notes 238-239.
46. Pro see e.g. Johanna Hey, 'Schutz des Vertrauens in BFH-Rechtsprechung und Verwaltungspraxis', *Deutsches Steuerrecht* (DStR) (2004), at pp. 1897 ff; contra see Anna Leisner, 'Kontinuitätsgewähr in der Finanzrechtsprechung', *Deutsche Steuerjuristische Gesellschaft* (DStJG), Vol. 27 (2004), at p. 214; Michael Fischer, 'Rückwirkende Rechtsprechungsänderung im Steuerrecht', *Deutsches Steuerrecht* (DStR) (2008), at p. 697; on the whole Klaus-Dieter Drüen, in: Tipke/Kruse, *Abgabenordung/Finanzgerichtsordnung*, (Cologne: Dr. Otto Schmidt Verlag Cologne), § 4 AO marginal notes 116-118.

practice on the inheritability of loss carry-forwards for purposes of the personal income tax[47], but excluded transfers undertaken in the past regardless whether the tax procedures are still open. The Senate argued that also judiciary is bound by the rule of law. Despite the fact that judgments have no erga omnes effect, they also constitute the legal situation the taxpayer relies on. Literature reviews of this judgment were ambivalent[48]. The tax authorities followed the Supreme Tax Court and granted a transitional rule by a circular, even though the judgment of the Supreme Tax Court has no legally binding force except in the decided case.

- In other cases the Supreme Tax Court only suggests that the tax authorities should decide case by case to grant protection of the confidence, based on sec. 163, 227 of the General Tax Code (Abgabenordnung).
- In some cases the tax authorities grant protection of trust after a change of the case law of their own accord, no matter whether this issue was addressed or not by the Supreme Tax Court.
- Apart from the question of protection of confidence against retroactive application of a new rule the Supreme Tax Court also applies a principle of continuity of its case law[49]. The principle of continuity does not deal with the legal consequences of the abandonment of existing case law, but with the requirements for such abandonment. Substantial objective reasons are necessary to invent a new rule. However, the principle of continuity does not prevent changes in the case law, but only increases the burden of argumentation.

The Supreme Tax Court provides/initiates protection of confidence *only* if the new rule is unfavourable for the taxpayer.

In contrast, the Constitutional Court has a permanent practice of granting protection to the fisc's revenue interests. If it holds a statute unconstitutional in general, its decisions have *ex tunc* effect. The legislator is supposed to repair the legal situation from the beginning. However, in tax law the Constitutional Court very often deviates from this general rule in order to protect the national budget. For this purpose the Court grants its decisions only *ex nunc* effect, often even only pro future effect. This '*Unvereinbarkeitsrechtsprechung*' weakens the protection of taxpayers against unconstitutional taxation, and is rejected by the prevailing opinion in the tax literature[50].

3.8.7. Views in the literature

3.8.7.1. Main views in the literature

The tax literature promotes a principle of non-retroactivity. Most authors oppose the tax-period related distinction between retroactivity and retrospectivity[51]. There is broad support for the view of the Supreme Tax Court that the decisive moment has to be the closing of transactions by the taxpayer. This is the moment at which the taxpayer needs certainty about the tax consequences of his economic decisions. He is entitled to be protected against

47. Judgment of the Supreme Tax Court of 17 December 2007, reference number GrS 2/04, *Federal Tax Gazette II* 2008, p. 668.
48. Pro also referring to the US practice of prospective overruling Hans-Joachim Kanzler, "Vertrauensschutz oder Rückwirkungsverbot bei Rechtsprechungswandel im Steuerrecht – entschieden am Beispiel der Vererblichkeit des Verlustabzugs', *Finanzrundschau* (FR) (2008), at p. 465; contra see e.g. Michael Fischer, 'Rückwirkende Rechtsprechungsänderung im Steuerrecht', *Deutsches Steuerrecht* (DStR) (2008), at p. 697.
49. See with references of the case law and the discussion in the tax literature Klaus-Dieter Drüen, in: Tipke/Kruse, *Abgabenordung/Finanzgerichtsordnung*, (Cologne: Dr. Otto Schmidt Verlag), § 4 AO marginal notes 307-311.
50. See e.g. Roman Seer, in: Tipke/Lang, *Steuerrecht*, 20th ed., 2009, § 22 marginal no. 287.
51. See e.g. Joachim Lang, in: Tipke/Lang, *Steuerrecht*, 20th ed., 2009, § 4 marginal no. 177.

a later change of the legal consequences, especially when he is no longer able to adjust his behaviour to the new law.

Some authors promote a uniform concept of tax statutes which affect economic decisions made in the past (see also section 3.8.2.1). They argue that the sharp – nevertheless often arbitrary – line between retroactivity and retrospectivity hinders reasonable results especially for the latter group of merely retrospective changes in the legal situation. The worthiness of protection against retrospective tax legislation can be as high as in the case of a retroactive change. Hence, there is no categorical difference between retroactive and retrospective tax laws. It might only indicate different levels of intensity of the betrayal of the taxpayer's confidence. However, most authors want to stick to the bifurcated concept of retroactivity/retrospectivity, mainly because they fear that otherwise the – fairly effective – protection against retroactive changes could be jeopardized, but they call for a better protection against merely retrospective legislation as well.

Apart from these conceptual questions, the way the Constitutional Court applies the grounds of justification towards retroactive legislation is also the object of criticism.

3.8.7.2. **Influence of the law and economics view**

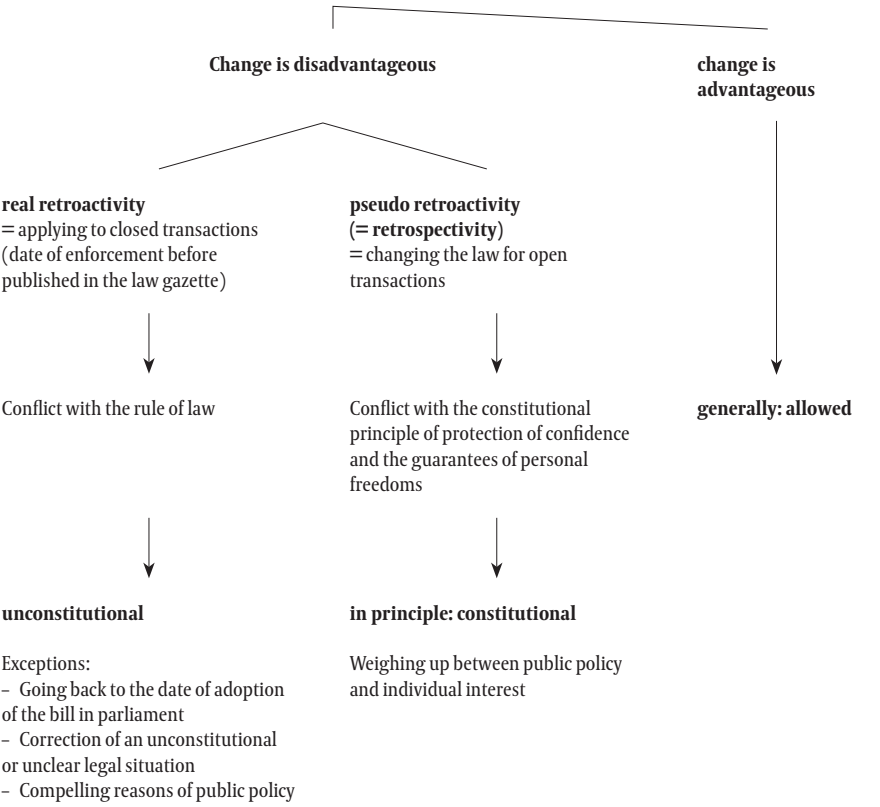
So far the law and economics view has had no impact on the jurisprudential debate in Germany. The reason for this could be that the whole debate in Germany is mainly driven by considerations of constitutional law, basically blind to the economic effects of retroactivity *vice versa* non-retroactivity.

The few protagonists of a greater freedom of the legislator to change tax statutes even retroactively or at least without grandfathering rules[52] base their point of view not on possible economic benefits, but on the democracy principle. They also fear a petrification of the law if the tax legislator were always obliged to provide grandfathering rules.

52. See e.g. Rainer Wernsmann, Grundfälle zur verfassungsrechtlichen Zulässigkeit rückwirkender Gesetze, *Juristische Schulung* (JuS) (2000), at pp. 39-43.

3.8.8. **Annex I**

Table 3-1. Changes of Tax Legislation: Constitutional Restrictions of Retroactivity



3.9.
Greece

*Eleni Theocharopoulou**
*Konstantinos Remelis***
*Panagiotis G. Melissinos****

3.9.1. Introduction

In Greek tax law, retroactivity of tax statutes containing substantive law is constitutionally permissible but within very limited temporal limits, especially in cases when the tax statute is unfavourable, in the sense that it imposes a financial burden. In particular, Article 78 para. 2 of the Greek Constitution provides that '*A tax or any other financial charge may not be imposed by a retroactive statute effective prior to the fiscal year preceding the imposition of the tax*'. Thus, pursuant to this constitutional principle, a tax statute may be applied to an event giving rise to the tax that precedes the time of promulgation of the tax statute, as long as the temporal restriction imposed by the Constitution is upheld. Nevertheless, this temporal restriction imposed by the Constitution does not apply in cases of retroactivity favourable to tax subjects.

The issue of retroactivity in Greek tax law is dealt with in theory and case law in the light of this constitutional provision that applies specifically and exclusively to tax statutes. It is not the only constitutional provision that delineates the retroactivity of tax laws, but it is the main provision. With regard to the conceptual distinction between retroactivity and retrospectivity, this distinction is not known in Greek tax law. This is the reason why there is no equivalent term for the notion of retrospectivity in Greek which is encountered in other legal orders. The only conceptual distinction that exists in Greek tax law is to be found in a theoretical textbook[1] and refers to the distinction between true and non-true retroactivity, which nevertheless is not addressed conceptually by the case law of administrative (tax) courts or of the Greek Council of State (Symboulio tis Epikrateias – StE).[2]

It should be noted, however, that the conceptual distinction between true and non-true retroactivity of statutes is also encountered both in Greek civil law theory and in the case law of civil courts, including the Supreme Court (Areios Pagos – AP).[3] However, this distinction is infrequently made and in any event, the content attributed by Greek civil law academics to these notions resembles its meaning in many other legal orders.

---

* Eleni Theocharopoulou contributed all sections of the report, except for sections 3.9.2.4, 3.9.2.5 and 3.9.7.

** Konstantinos Remelis contributed sections 3.9.2.4 and 3.9.2.5 of the report.

*** Panagiotis G Melissinos contributed section 3.9.7 of the report.

1. Th. Fortsakis, *Forologiko Dikeo* (Tax Law) (Athens-Komotini: Ant. N. Sakkoulas Publications, 2008), no. 123, at p. 123.
2. Research on judgments by the Greek Council of State/Symboulion tis Epikrateias (StE) can be done by case number and year of promulgation of judgments at www.ste.gr
3. Research on judgments by the Greek Supreme Court/ Areios Pagosis can be done by case number and year of promulgation of judgments at www.areiospagos.gr.

The following issues will be examined below: Terminology issues, as discussed in theory and case law of Greek courts (3.9.2), issues of *ex ante* evaluation of retroactivity (3.9.3), the use of retroactivity in legislative practice (3.9.4), as well as issues that case law has been occupied with, such as the *ex post* evaluation of retroactivity (3.9.5) and the retroactivity of case law (3.9.6). Finally, the views in the literature will be presented (3.9.7).

3.9.2. **Terminology**

3.9.2.1. **Distinction between retroactivity and retrospectivity**

As mentioned in the introduction, legal scholars in Greece use the term 'retroactivity', but not the term 'retrospectivity'. In Greek legal academia retroactivity is mentioned in general, without any emphasis placed on the distinctions of retroactivity from other concepts. Nevertheless, except for the concept of retroactivity, the distinction between true and non-true retroactivity is sometimes used.

3.9.2.1.a. Conceptual variations

Thus, Greek legal academics infrequently use the concepts of 'true retroactivity' and 'non-true retroactivity' theoretically.[4] In fact, one could claim that 'true retroactivity' according to Greek legal scholars is mostly identical to the concept of 'formal retroactivity', according to Dutch tax literature, whereas 'non-true retroactivity has some points in common with retrospectivity – in the broad sense it has and therefore with material retroactivity, according to Dutch tax literature.

It should be stressed in any case that in Greek academia the theoretical distinctions between true and non-true retroactivity are used neither as frequently nor with absolutely the same content in the various fields of law. Therefore, with regard to this theoretical distinction which is frequently encountered, especially in civil law, it is established that while it is utilized in the case law of the Greek Supreme Court (Areios Pagos) (i.e. of the civil courts), it is not encountered in the case law of the administrative courts or the Council of State (Symboulion tis Epikrateias – (StE). This means that theoretical distinctions concerning retroactivity are not used by the administrative courts. In the frame of the *ex post*, incidental and ad hoc review of the unconstitutionality of statutes, the administrative courts and the Council of State (StE) rule on the permissibility (or impermissibility) of the retroactivity of a statute, whether administrative or tax.[5] In particular, with regard to tax laws, the non-utilization of the relevant theoretical distinctions is certainly justified by the fact that there is an express constitutional provision that allows even the retroactive levying of tax charges, but within a particular time frame, as will be presented in detail.[6]

Given the fact that there are discrepancies in the legal definition of retroactivity in various fields of law, the issue is presented with respect to two branches: civil law (3.9.2.1.a.i) and tax law (3.9.2.1.a.ii).

3.9.2.1.a.i. In civil law

In civil law, the distinction between true and non-true retroactivity is described as follows: The phrase 'true retroactivity' of the law usually intimates the regulation by law of legal relations or effects that arise from or came about before the commencement of its application. In contrast, a law is 'non-truly retroactive' when a new law regulates (amends or abolishes) legal effects emerging after the commencement of its application (even though they emerge

4. See mention of these terms in Fortsakis, *supra* note 1, no.at p. 123.
5. On the unconstitutionality review of statutes by Greek courts, see below under 3.9.5.
6. See below under 3.9.3.1 and under 3.9.5.1, 3.9.5.2.

from legal relations or situations existing prior to the law), so this is not actually retroactivity.[7] This is also what the Supreme Court (Areios Pagos -AP) has held.[8]

3.9.2.1.a.ii.In tax law

In tax law there is some differentiation in the relevant definitions. The concept of 'true retroactivity' is defined in only one textbook and means the retroactive enactment of new tax charges or the retroactive amendment of the existing favourable tax provisions for the worse,[9] given the fact that the retroactivity of tax abatements is in principle constitutionally permissible in Greece. Furthermore, the term 'non-true retroactivity' implies the direct application of new provisions, even in cases pending before tax authorities or courts.[10]

The case law of administrative courts and of the Council of State (StE) does not utilize the relevant distinction at all. The tax provision in question is controlled by the Council of State (and the administrative courts) with regard to its eventual non-compliance with Article 78 para. 2 of the Greek Constitution (on the temporal restriction of unfavourable retroactivity of tax legislation,[11] without any reference to the concepts of true or non-true retroactivity (in the sense mentioned earlier) or to any other concept of retroactivity. Thus, the following were held by the jurisprudence of the Council of State (StE) to be cases of retroactive taxation to the worse: the retroactive abolition or the restriction of an existing favourable tax regime,[12] the retroactive change in the method of determination of the tax base,[13] the retroactive limitation of deductible expenses[14] etc.

In conclusion, the theoretical distinction between true and non-true retroactivity is not especially used by the case law of the courts in tax cases. Nevertheless, if cases of non-true retroactivity of tax laws – in the sense attributed to the concept of non-true retroactivity by tax law theory in Greece – are considered to fall theoretically under the concept of retrospectivity used in the questionnaire, the following should to be noted: Only in some of the cases where the tax legislator 'intervenes' in cases pending (in the sense of retroactive regulation of pending cases as defined by the tax legislature) before tax authorities or courts, the jurisprudence of the Council of State (StE) poses certain restrictions to this legislative 'retroactivity'.[15] As to the remainder, the non-true retroactivity of tax laws is mostly found by case law to be in accordance with the Constitution.

3.9.2.1.b. Clear distinction between 'retroactivity' and 'retrospectivity'?

In Greek legal academia and, in particular, in the field of tax law there is no distinction between these two concepts. Thus 'retrospectivity' in a broad sense may have not been the

7. See Ap. Georgiadis, *Genikes Arches Astikou Dikeou* (General Principles of Civil Law) (Athens-Komotini: Ant. N. Sakkoulas Publications, 2002), at p.32, who notes that non-true retroactivity is not in fact retroactivity and it establishes the unity of law.
8. AP 1316/2006, AP 1664/2006, AP 562/2009.
9. Fortsakis, *supra* note 1, at p. 123.
10. Fortsakis, *supra* note 1, no.at p. 123.
11. On Article 78 para. 2 of the Greek Constitution, see for more details below under 3.9.3.1. On tax statutes that provide for the legislator's intervention in pending proceedings, which tax theory in Greece considers to be a case of non-genuine retroactivity, and on the review of their unconstitutionality, see below mainly under 3.9.2.6.b, 3.9.2.7.a.i and 3.9.4.3.a.
12. OlStE 1865/1985, StE 1704/1986.
13. StE 3068/1984.
14. StE 4155/1984, StE 1485/1989.
15. As to be presented below under 3.9.2.7.a and 3.9.4.3.a.

object of discourse by Greek legal scholars, at least with regard to tax matters,[16] probably because of the fact that retrospectivity in broad sense is constitutionally permissible in Greek tax law.

3.9.2.2. **Relevance of tax period**

With regard to the conceptual distinction between actual retroactivity and de facto retroactivity, it should be noted that legal discourse in Greece does not employ this distinction. Nevertheless, this distinction is of a certain historical importance for Greece. In particular, according to earlier jurisprudence of the Council of State (StE), a relevant issue arose under the regime of total constitutional prohibition of the retroactivity of tax law which was applicable in Greece on the basis of the military junta constitution of 1968-1974. In fact, on the basis of that 'constitutional' text and with regard to income taxation of the current financial year, a law enacted in the year taxing the income produced that year was held to be unconstitutional.[17] Therefore, under the regime of a total prohibition of the retroactivity of tax legislation, the Council of State (StE) ruled that not only actual, but also de facto retroactivity was unconstitutional.

Under the current Greek Constitution in force (i.e. since 1975 and on), this conceptual distinction between actual retroactivity and de facto retroactivity is not of particular interest, given the fact that Article 78 para. 2 of the Constitution expressly permits both de facto and actual retroactivity, as long as the latter does not extend beyond the fiscal year prior to the year of enactment of the law.[18] Moreover, this is provided by the Greek Constitution regardless of the kind of tax.[19] Besides, it is the prevalent opinion in Greece that especially where income is concerned, the annual taxable base is only known by the end of the year, given the fact that the taxable base of the taxpayer's annual income is completed on the last day of the fiscal year.[20]

3.9.2.3. **Interpretative statutes**

3.9.2.3.a. Phenomenon of 'interpretative statutes' explicitly known?

The Greek legal system expressly covers the phenomenon of 'interpretative statute'. The interpretation provided through such a law is called an authentic interpretation of law. Authentic interpretation is provided by the Constitution in Article 77 and produces retroactive effect. In particular, in the frame of the authentic interpretation of the law, if there is a need for clarification of some law, the legislative power interprets the previous law by another law, the interpretative statute.

---

16. With regard to the distinction between genuine and non-genuine retroactivity in general, see K. Chrysogonos and G. Pinakidis, 'I archi tis prostasias tis empistosynis sto germaniko dimosio dikeo' ('The principle of legitimate expectations in German public law'), *Dikeomata tou Anthropou*, Special edition I, (2003), at pp. 38-47, S. Stamatopoulos, *I dikonomiki anadromi ton neon ousiastikon ermineftikon nomon* (The procedural retroactivity of new interpretative statutes of substantive law), (Athens: Research Institute for Procedural Studies, 1989), see, for example, at pp. 54-86, J. Iliopoulos – Strangas, *Rückwirkung und Sofortwirkung von Gesetzen – Eine verfassungsrechtliche Untersuchung unter Berücksichtigung des deutschen und griechischen Steuerrechts*, (1986).
17. See StE 1723/1981, *Armenopoulos* 5 (1982), at pp. 388-389.
18. On the issue of Article 78 para. 2 of the Constitution, see for more details below under 3.9.3.1 and 3.9.5.2.
19. See however on this issue under 3.9.3.1 below.
20. Compare K. Finokaliotis, *Forologiko Dikeo* (Tax Law), no. 280 (Athens-Thessaloniki: Sakkoulas Publications, 2005), at p. 127.

3.9.2.3.a.i. Legal basis for 'interpretative statutes'

The legal foundations of the retroactive effect of interpretative statutes are to be found in the Greek Constitution. It emanates in particular from the interpretation of Article 77 para.1 of the Constitution in conjunction with para. 2. In Article 77 para. 1 it is provided that 'the authentic interpretation of the statutes shall rest with the legislative power', while in para. 2 of the same article (Article 77) that 'a statute that is not truly interpretative shall enter into force only as of its publication'. The prevailing opinion in Greek case law and theory regarding the retroactivity of interpretative statutes is the following: In the sense of Article 77 para. 1 of the Constitution, by concretizing its meaning, the interpretative provision reveals the initial meaning of the provision interpreted and thus applies together with the provision interpreted, having retroactive effect.[21] Despite the fact that it may appear to be an interpretative provision, the newer provision is not an authentic interpretation of the law that results in retroactivity, if there is no ambiguity and doubt about the provision interpreted; on the contrary, it is a pseudo-interpretative statute that will apply only for the future (ex nunc), according to Article 77 para. 2 of the Constitution.[22]

Nevertheless, as far as tax statutes are concerned, the question arises whether an interpretative tax law should have the retroactivity attributed by the Constitution to all interpretative statutes or, on the contrary, whether its retroactivity is limited to the time limit of one fiscal year of permissible retroactivity imposed by the Constitution on tax charges (Article 78 para. 2).[23] According to the prevailing opinion, the authentic interpretation of tax law should be subject to the temporal restriction of the permissible retroactivity of Article 78 para. 2 of the Constitution, which applies specifically to tax charges.[24] This view is founded on the argument that, since the Constitution prohibits the retroactivity of tax laws imposing tax charges that extends beyond the fiscal year preceding the year of its enactment, Article 78 para. 2 entails a special provision when compared to the general provision of Article 77 on interpretative statutes.[25]

3.9.2.3.a.ii.Special term for 'interpretative statutes'

There is no special term for this kind of retroactivity. There is however, as already mentioned above, a special term for this kind of interpretation of the law, which is termed in the Constitution 'authentic interpretation' and the respective laws are called authentic interpretative statutes.

3.9.2.3.a.iii. Standards used for characterization as 'interpretative statutes'

With regard to the standards employed to determine that an interpretative statute is truly interpretative the following requirements must be met: 1. the statute being interpreted should contain a provision of an ambiguous and doubtful nature that creates uncertainty and renders its authentic interpretation by interpretative statute necessary. Usually doubts as to the meaning of a provision arise either within the administration or due to disagree-

21. For examples in case law see StE 894/1979, OlStE 5123/1996, OlStE 3210/2001. On theory, see P. Pararas, *Syntagma (Constitution) 1975 – Corpus II – articles 51-80 – Parliamentary Law*, (Athens-Komotini: Ant. N. Sakkoulas Publications, 1985), at p. 505, and the respective footnotes, Stamatopoulos, *supra* note 16, at pp. 135-136 and the respective footnotes; compare also G. Balis, *Genike arhe tou astikou dikeou* (General principles of civil law)(1955), at p. 33.
22. For example see Stamatopoulos, *supra* note 16, at pp. 142-143 and the case law cited there.
23. See for more details below under 3.9.3.1, 3.9.5.1 and 3.9.5.2.
24. I. Anastopoulos, *Forologiko Dikeo* (Tax Law), at p. 141, K. Finokaliotis,(Thessaloniki: Sakkoulas Publications, 1999), at p. 133, Stamatopoulos, *supra* note 16, at p. 50, N. Chatzitzanis, *Kodix Diikitikis Dikonomias* (Code of Administrative Court Procedure) – *Commentary by article*, (Athens-Komotini: Ant. N. Sakkoulas Publications, 2004), at p. 631, Fortsakis, *supra* note 1, at p. 129.
25. Pararas, *supra* note 21, at p. 502, nos. 110-111.

ments in case law (e.g. strong minority opinions).[26] The provision being interpreted is ambiguous when, after using all known methods of interpretation, it cannot be deduced which legal rule (i.e. which meaning or content of the rule) has actually been adopted.[27] 2. the interpretative statute should attribute to the provision interpreted its real meaning and 3. it has to be voted by the parliament in plenum (Article 72 para. 1 of the Constitution), 4. the interpretative statute must be certainly of a later date than the statute being interpreted, 5. even if the interpretative statute is not called such, it should be clear from the provisions of the statute that it is interpretative in nature. Thus, in the adjudication of many cases of the Council of State (StE) on authentic interpretative statutes, mention is made either of the 'type of authentic interpretation' of an interpretative statute, i.e. the phrase 'the true meaning or the meaning of the provision XYZ is …' appears, or of the doubts caused by the statute interpreted e.g. to the Administration, and in particular to its ambiguity.[28] For example, a provision clarifying a pre-existing provision that was ambiguous as to its meaning and extent of application, due to consecutive references and due to the wording of the relevant provisions, was found to be authentically interpretative.[29]

If a taxpayer has a different opinion as to the interpretation that is to be given to the statute interpreted, I do not consider that there could be a problem. A problem could be posed only if the statute interpreted does not necessarily require authentic interpretation, but was in fact clear and therefore the alleged true interpretative statute is pseudo-interpretative. In that case, the following could happen: If taxpayer is entitled to bring an action seeking annulment of the tax administration act levying a tax charge on him, the taxpayer may claim in his brief that, based on the interpretative statute, the latter is not truly interpretative, as the statute interpreted was clear and did not require any authentic interpretation. Then, the taxpayer may also support his view. The court that is to rule on the action for annulment will adjudicate incidentally based on the aforementioned standards whether it is a truly interpretative or a pseudo-interpretative statute. In the latter case, the court will rule that the law applies since its publication and not retroactively. At the same time, the court may attribute to the statute being interpreted the meaning claimed by taxpayers. This, however, does not affect other cases, but only the case adjudicated. In any case, if other courts addressed the matter and contradictory judgments emerge, then the competent court for the resolution of the matter is the Supreme Special Court (Anotato Eidiko Dikastirio) (Article 100 of the Constitution).[30]

3.9.2.4. **Validation statutes**

3.9.2.4.a. Phenomenon of 'validation statutes' known?

Before discussing the phenomenon of validation statutes in Greece, it should be stressed that in Greece the annulment by the legislature of a particular court judgment is constitutionally prohibited. Such a practice would contravene the constitutionally guaranteed principles of separation of powers (Article 26), of the equality of citizens before the law (Article 4), but also to the citizens' right to judicial protection (Article 20 para. 1). Nevertheless, according to the established case law of the Council of State(StE), it is considered that the legislature's intervention in pending proceedings does not violate the constitutionally

26. Pararas, *supra* note 21, at p. 482, no. 31.
27. Pararas, *supra* note 21, at pp. 483-485, nos. 34 et seq.
28. OlStE 5123/1996, StE 248/2003, StE 2700/2003, StE 2532/2004, StE 121/2005.
29. StE 248/2003, StE 2700/2003, StE 2532/2004, StE 121/2005.
30. On the review of the unconstitutionality of statutes in Greece, see Eleni Theocharopoulou, in: Ana Paula Dourado, ed., *Separation of Powers in Tax Law – 2009 EATLP Congress, Santiago de Compostela (4-6 June 2009)*, EATLP International Tax Series, Vol. 7 (EATLP, Series editor Kees van Raad 2010), at pp. 115 – 116. See also for more details below under 3.9.5 and 3.9.6 (and especially on the role of the Supreme Special Court) and the relevant footnotes.

established principles of separation of powers (Article 26), of the equality of citizens before the law (Article 4), or the citizens' right to judicial protection (Article 20 para. 1) under the following conditions: that rules are general and impersonal and no final court judgments have been issued nor that the case is pending before a court of cassation.[31] Certainly in some cases, both in earlier case law of the Court of Auditors (Elegtiko Synedrio-ES)[32] and in recent cases of the Council of State (StE)[33] it is implied that generally lis pendens before court authorities and not only the finality of a judgment hinders the legislative intervention under influence of the European Court for Human Rights case law, with regard to the observance of Article 6 para. 1 sentence a ECHR on the right to a fair trial, as long as claims are discharged. Furthermore, the new law applied in pending cases may not directly ratify an administrative act, the legitimacy of which is pending before a court.[34]

With regard to validation statutes in Greece, this has a special content. The 'validation statute' usually contains the retroactive validation of unlawful regulatory administrative acts since their date of issue.[35]

Validation statutes in Greece were addressed in jurisprudence and by scholars with regard to their dubious constitutionality for various reasons. Academics were particularly critical.[36] One of the reasons was the fact that validation statutes ratify retroactively a regulation of the administrative authority, usually a ministerial decree, which has been issued in violation of the Greek Constitution, because it has been issued without statutory delegation or in excess thereof (in violation of the Greek Constitution).

While in the past the case law of the Council of State(StE) had accepted the constitutionality of such validation statutes[37] and therefore their retroactivity, nevertheless under the influence of theorical writings[38] case law made a significant turn.[39] The now-prevailing opinion in the case law of the Council of State (StE)[40] on validation statutes accepts that

---

31. StE 1502/1999 (on pension issues), OlStE 542/1999.
32. Plenum ES 2274/1997.
33. StE 241/2009, StE 3801/2003.
34. If it is not pending before the courts, see for a direct sanction of an administrative act, OlStE 1847/2007.
35. See on this matter, and on other cases of validation statutes, Dim. Kontogiorga – Theocharopoulou, 'I paremvasi tis ektelestikis exousias stis diikitikes diafores meso nomothetikon rythmiseon' ('The intervention of the executive power in administrative disputes via legislative regulation') in: *Epistimoniki Imerida tis ENOVE (ENOVE scientific colloquium)* (Thessaloniki: Sakkoulas Publications, 1992), at p. 163 et seq.
36. See for example N. Sakellariou, 'To provlima tis dia nomou kyroseos anypostaton i plimelon aplos dioikitikon praxeon' ('The issue of validation by statute of non-existent or merely deficient administrative acts'), *To Syntagma* (1978), at p. 618 et seq., Dim. Kontogiorga – Theocharopoulou, *E synepie tis akyroseos diikitikis praxeos enandi tis Diikiseos* (Legal effects of the annulment of administrative acts towards the Administration) (Thessaloniki: Sakkoulas Publications, 1980), at pp. 50 et seq., 244 et seq., 256 et seq., M-El. Panagopoulou, 'To provlima tis anadromikis dia nomou kyroseos paranomou diikitikis praxeos prosvlithisas enopion tou StE' ('The issue of retroactive validation by statute of an unlawful deficient administrative act that has been contested before the Council of State'), in: Haristirios Tomos (Symmikta) pros timin G. Papahatzi, *Dimosia Diikisi kai Diikitiki Dikeiosyni* (G. Papahatzis Honorary Volume: Public Administration and Administrative Justice) (1989), at p. 751 et seq., Ep. Spiliotopoulos, *Enhiridio Diikitikou Dikeou* (Manual of Administrative Law) (Athens-Komotini: Ant. N. Sakkoulas Publications, 1991), at p. 535 et seq., Kontogiorga, *supra* note 35, at p. 163 et seq.
37. StE 2270/1987.
38. Sakellariou, *supra* note 36, at p. 618 et seq., Kontogiorga – Theocharopoulou, *supra* note 36, at p. 50 et seq., 244 et seq., 256 et seq., P. Pavlopoulos, *I syntagmatiki katohyrosi tis etiseos akyroseos – Mia synchroni epopsi tou Kratous Dikeou* (The constitutional entrenchment of the administrative action for annulment – a contemporary view on the rule of law) (Athens-Komotini: Ant. N. Sakkoulas Publications, 1982), at p. 290, Panagopoulou, *supra* note 36, at p. 751 et seq.
39. Something that theory commended. See O. Papadopoulou, 'Nomothetiki kyrosi kanonistikon praxeon: to chroniko tis nomologiakis metastrofis' ('Legislative validation of regulatory acts: a chronicle of the turnaround in case law'), *To Syntagma* 1992, at p. 51.
40. StE 3596/1991, StE 1854/1992, StE 3057/1992, StE 1235/1994, StE 822/1995, StE 4605/1995, StE 3185/1996.

they are ineffective as to the part retroactively ratifying a legal rule; yet they apply for the future.[41]

With particular reference to tax validation statutes it is noted that, while the case law of the Council of State (StE) accepted until 1991 that the retroactive ratification of relevant ministerial decrees was lawful within the time limits of the constitutionally permissible retroactivity (Article 78 para. 2),[42] this case law made a U-turn[43] under the influence of theory[44]. Due to the constitutional principle of the formal legality of the tax (Article 78 para. 1 and 4 of the Greek Constitution), according to which the object of taxation, tax rate, tax abatements and exemptions require regulation by formal statute, i.e. an act by the legislature, those substantive tax elements cannot be founded on a ministerial decree but they must be founded on the formal (validation) statute.[45] Therefore, the relevant tax regulations cannot apply retroactively, within the time limits of the constitutionally permissible retroactivity (Article 78 para.2), but only after their ratification by law. The case law accepts the same for validation statutes of various 'tax contracts'[46], e.g. of the 'development contracts' signed between the Ministry of Finance of Greece and taxpayers – entrepreneurs. Contracts are signed in the frame of development efforts by the Ministry, by which certain tax privileges – incentives are granted to the counterpart (usually taxpayer – entrepreneur), in order to take on business activity in a certain field or in a particular geographical territory. Due to the principle of formal legality of tax (Article 78 paras.1 and 4 of the Greek Constitution), substantive tax provisions must be based not on a contract but on the formal (validation) statute. Therefore, the relevant tax regulations cannot apply retroactively e.g. from the time of conclusion of a tax contract, nor within the time limits of the constitutionally permissible retroactivity (Article 78 para. 2), but only after their ratification by law.

3.9.2.4.a.i. Standards used for characterizations as 'validation statutes'
No standards are used to determine that validation statutes really validate legal practice (and not only the unilateral view of the tax authorities). Anyway, validation statutes do not have this meaning in Greece.

3.9.2.4.a.ii.Difference between 'validation statute' and 'interpretative statute'
In Greece there is no relation between validation and interpretative statutes. Furthermore, the retroactivity of validation statutes is no longer accepted in Greece.

3.9.2.5. **Comparison moment**

In Greek legal theory there is a distinction between formal validity and substantive validity of a statute. The formal validity of the statute commences on the date of its publication in the Government Gazette, unless another means of publication applies that approximates its character and the object of the regulation attempted. The moment of 'comparison' for the determination of the statute's retroactivity is the commencement of its formal validity. This results directly from case law, which, according to the wording used in judgments, calculates the retroactivity period that is permissible pursuant to the Greek Constitution, since the promulgation of the statute.[47] The substantive validity is distinguished from the formal

41. StE 186/2004, StE 479/2006, StE 3490/2007.
42. See Fortsakis, *supra* note 1, at pp. 81-82, no. 95. See StE 3386/1985, StE 4225/1988.
43. OlStE 3596-97/1991, OlStE 872/1992,OlStE 4670-73/1988. See also StE 914/1997. *Compare* and StE 3016/2009.
44. Loukas Theocharopoulos, *Forologiko Dikeo – Geniko* (Tax Law – General part) (Thessaloniki 1981), at pp. 140 -144.
45. *Compare* L. Theocharopoulos, *supra* note 44, at p. 138 et seq. See Finokaliotis, *supra* note 20, at pp. 94-95, Fortsakis, *supra* note 1 at pp. 81-82, no. 95. See also StE 914/1997.
46. L. Theocharopoulos, *supra* note 44, at p. 138 et seq., Fortsakis, *supra* note 1, at p. 83, no. 96.
47. See OlStE 1865/1985.

validity of the statute, if the latter sets a date of entry into force different from the date of its publication in the Government Gazette. The substantive validity of a statute depends also on the state institution issuing the statute.

Thus, if the legislation is issued by the legislative power, then it is called 'formal statute' and its substantive effect according to the case law of the Council of State (StE) commences ten days after its publication in the Government Gazette (Article 103 of the Law introducing the Civil Code), unless otherwise stipulated in the formal statute. In other words, the statute itself may set the date of its entry into force at a time posterior or anterior to its date of publication in the Government Gazette. Nevertheless, as far as the possibility of retroactivity of unfavourable tax laws is concerned, it is limited to the previous fiscal year of the year of publication of the statute, according to Article 78 para. 2 of the Greek Constitution.[48] Any legislative provision to the contrary is unconstitutional. Moreover, the provision of retroactivity in tax fines is avoided, given that they are frequently of criminal nature.[49]

If the rule is issued by the executive power (always based on statutory delegation), then it is called 'regulatory administrative act' (e.g. ministerial decree or presidential decree containing legal rules) and its substantive validity is different from statutes. It commences on the date of publication in the Government Gazette (or in any other conducive means that is stipulated by law),[50] unless the regulatory administrative act determines a time subsequent to its publication. Such a rule may be retroactive only if the formal statutory law containing the delegation provided expressly for retroactivity of the regulatory administrative act.[51] Furthermore, if the content of this regulatory administrative act (based on statutory delegation) is a tax matter, any retroactivity is limited by Article 78 para. 2 of the Greek Constitution. In fact, if it is a tax fine, any retroactivity may be excluded.

Nevertheless, it may be the case that the date of the Government Gazette, in which the said statute was promulgated may not coincide with the date of the Government Gazette's actual circulation, i.e. the date of its availability to the public. Thus, the date of actual circulation may be posterior to the date of publication, in which case, according to the case law of the Council of State[52], the 60-day time limit for filing an action for annulment commences on the day following the public availability of the Government Gazette issue.

3.9.2.6. **Concept of retrospectivity**

3.9.2.6.a. Definition of retrospectivity

As already mentioned above, the issue has not been addressed by tax law theory in Greece. The scientific discussion in Greece refers to topics of true or non-true retroactivity of statutes, which have already been discussed above. Moreover, as already noted, the issue is not of so much interest in Greece, in as much as the legislature may levy taxes even with true retroactivity, despite the restrictive time limits of Article 78 para. 2 of the Constitution.[53] Therefore, cases that would fall under retrospectivity in a broad sense are constitutionally permissible in Greece.

48. For more details see below, especially under 3.9.3.1 and 3.9.5.1, 3.9.5.2.
49. This appears to be the recent tendency in the case law of the Council of State, being influenced by the case law of the European Court of Human Rights. For more details, see below under 3.9.2.7.a.ii and under 3.9.5.2.
50. StE 390/1951, StE 2031/2009.
51. OlStE 3659/1980, StE 4914/1987, StE 2031/2009.
52. OlStE 2081/1987, StE 2139/1999, StE 2946/2008, StE 2107/2009.
53. For more details see below under 3.9.3.1.

Consequently, tax law theory and especially case law have addressed cases that are retroactive or not in the sense of Article 78 para. 2 and whether these cases are constitutional or not, while there is no mention of the concept of retrospectivity.

3.9.2.6.b. Examples of retrospectivity

As already mentioned, the theoretical distinction between retrospectivity and retroactivity has not really been addressed by tax law theory in Greece.

An ambiguous case is, in my opinion, that of the legislature intervening in a pending trial. Thus, the application of a new tax statute of substantive law to a pending trial is not characterized in the case law as retrospectivity, but as retroactivity.[54] However, the theory of tax law accepts this case as one of non-true retroactivity.[55]

Moreover, in my opinion, the following practice could be a case of retrospectivity within the meaning used in the General Report: The practice of the Greek tax legislature to extend the statute limitations for the state's fiscal claims before it expires has been repeatedly held by the case law of the Council of State (StE) to be constitutional. According to this case law, as long as the extension of the statute of limitations is granted before its expiry, then this law is not retroactive and it is constitutional.[56] On the contrary, if the statute of limitations expires and its extension is then provided for in a new statute, then this is a case of the retroactive levy of tax.[57]

3.9.2.7. **Distinction between substantive and procedural statutes**

Except for the distinction between procedural statutes and tax statutes of substantive law, the present section will deal with procedural provisions, as a special category of procedural statutes. In the Greek legal order the triple distinction between procedural statutes (dikonomiki nomi), i.e. statutes that are applied in the procedure before the courts, procedural provisions (diadikastikes diataxis), i.e. provisions that are applied before (tax) authorities, and tax statutes of substantive law seems to be more accurate. It should nevertheless be noted that the distinction between procedural statutes (dikonomiki nomi) and procedural provisions (diadikastikes diataxis) is not prevalent either in Greek tax law theory,[58] or in case law. In spite of this, it is more correct as a distinction, as, pursuant to Greek law, different procedures apply before administrative and tax authorities and before the administrative – tax courts. In fact, except for the Code of Procedure before Administrative Courts, there is now a Code of Administrative Procedure. Besides, in contrast to courts in other legal orders, Greek courts, both administrative – tax courts and civil courts, have two instances and beyond that, adjudicate appeals in cassation filed before the Council of State (Symboylion tis Epikrateias -StE) for administrative-tax disputes, and before the Supreme Court (Areios Pagos -AP) for civil and criminal disputes. For all the above reasons, the distinction between procedural rules in procedural statutes and procedural provisions is preferred in the present national report. The term 'procedural statutes' will be used here to mean statutes referring to court competence and the procedure to be observed before courts. In contrast, the provisions concerning the tax authority competence and those concerning procedure before tax authorities are considered procedural provisions. Despite the fact that

54. On the issue of the intervention of legislature in pending proceedings, see the analysis below under 3.9.7.2.a and 3.9.4.3.
55. Fortsakis, *supra* note 1, at p. 123, no. 123.
56. StE 4710/1984, StE 2866/1985, StE 3141/1985, StE 1104/1992, StE 523/2000, StE 858/2002. *Compare* StE 1508/2002.
57. Compare StE 1508/2002.
58. However, in N. Chatzitzanis there is reference to the said distinction, yet without emphasis, see N. Chatzitzanis, *Enhiridion Genikon Arhon Forologikou Dikeou* (Manual of General Principles of Tax Law) (Athens – Komotini: Ant. N. Sakkoulas Publications, 1991), at pp. 75-76.

Greek case law and theory make no reference to the relevant distinction, this distinction has a certain impact in Greece with regard to the application of tax law in time.

In particular, the application in time of a tax statute in Greece is indeed determined up to a certain extent by whether the tax statute is a substantive one or on the contrary, if it is a procedural statute referring to court competence and procedure to be observed before courts (in tax cases) or a tax statute of procedural law, i.e. of a tax statute referring to competence and procedure to be observed before the tax authorities. Nevertheless, there are also other significant parameters for the temporal application of such laws. The relevant case law of the Council of State (StE) always is handed down on a case-by-case basis, taking into account various parameters. Before referring to the application in time of procedural provisions in tax statutes (that refer to the procedure before tax authorities), reference will be made to the application in time of procedural statutes referring to competence and procedure before courts, on the one hand, and, on the other hand, of tax statutes containing substantive law. Finally, reference will be made to procedural provisions referring to competence and procedure to be observed by the taxpayer or / and the tax administration in procedures before the tax authorities.

3.9.2.7.a. With respect to the impact of a statute having immediate effect

3.9.2.7.a.i. On procedural statutes

In principle, new procedural statutes apply in pending proceedings, unless there is an express provision to the contrary in the procedural law. In particular, the case law of the Council of State (StE) has ruled that, according to the general principle of the law of procedure, newer provisions on court competence and procedure[59] apply also in pending proceedings, unless there is a provision to the contrary in the statute.[60] In fact, case law seems to definitely uphold this principle in cases where the newer procedural statute enhances the protection of citizens.[61] It should be noted, however, that there are so many express contradictory procedural provisions on the applicable procedural status, as will be presented below, that the principle above is of limited practical application. Besides, case law handed down a case-by-case basis. Thus, especially for the admissibility of remedies (instances, court competence, which remedies and which time limit) before ordinary administrative courts,[62] where previously applicable procedural statutes did not expressly provide for the basis for adjudication of its legal status, a general principle of law had been formulated, by which the admissibility of remedies had to be adjudicated according to the statute that was in force at the time that the contested judgment was issued[63]. Yet nowadays there is an express general statutory provision especially for the admissibility of legal remedies (which renders the previously applicable general procedural principle[64]), pursuant to which 'the admissibility of legal remedies is adjudicated according to the statute that was in force at the time that the contested judgment was issued.'[65] Thus, taking into account that the payment of the required appeal fee is a prerequisite for the admissible filing of legal remedies, it was ruled that, should the legal regime

59. According to the case law of the Council of State (StE), procedure is e.g. the way of granting power of attorney to a lawyer, see StE 285/ 1999.
60. StE 5343/1987, StE 2048/ 1988, StE 4571/1988, Ste 285/1999, StE 564/2004, StE 1710/2008.
61. StE 2048/1988.
62. It should be noted that the Council of State (StE) is not affeceted by this, as there was an explicit provision for it.
63. See Chatzitzanis, *supra* note 24, Article 83, at p. 650 and the relevant case law there.
64. Chatzitzanis, *supra* note 24, Article 83, at p. 650.
65. Article 83 para. 3 of the Code of Administrative Court Procedure (regarding ordinary administrative courts), Article 77 para. 5 of p.d. 18/1989 (regarding the Council of State/StE), Article 24 para. 1 Law Introducing the Code of Civil Procedure. See also case law in OlStE 2659/2008, StE 2946, StE 471/2008, StE 3588/2006, StE 1081/2006, OlStE 3407/2001, OlSte 654/1993.

regarding appeal fees be modified, when there is a lack of a legislative regulation to the contrary, the statute that was in force at the time that the contested judgment was issued applies, and not what applied at the time of the hearing of the case or of the payment of the fee.[66] Therefore, with regard especially to all issues of admissibility of legal remedies, these are adjudicated according to an express legislative provision – of Greek law – pursuant to the statute that applied at the time that the contested judgment was issued, unless of course, a new special statute provides otherwise, e.g. application to pending cases.

Article 78 para. 2 of the Constitution, which refers to tax statutes in general, does not apply to procedural statutes. Thus, in the case of procedural statutes on tax cases especially, their retroactivity appears not to be temporally restricted by the said article,[67] but their application is possible in pending proceedings. However, the potential unconstitutionality of the legislator's intervention in a pending trial is (*ex post*) reviewed by the case law of the Council of State (resulting in the non-application of the unconstitutional provision by the judge in the case at hand), only on the basis of other constitutional principles, such as that of Article 20 on the citizens' rights to judicial protection and of Article 6 ECHR on a right to a fair trial.[68] For example, the express abolition by law of the appellate instance through the establishment of general and objective criteria (e.g.in all pending appeals that have not been heard) was considered to be constitutional[69]. In particular, it was a legislative restriction of the grounds for appeal in tax cases, leading to an express termination of proceedings pending before the Administrative Court of Appeals, for cases not yet heard. It was held in this matter that the appeal is not an established procedural right of the claimant and that such a statute (establishing a retroactive restriction of the grounds for appeal and therefore an abolition of pending appeals not yet heard) is constitutional and does not contravene Article 6 para. 1 ECHR[70].

In any case, with regard to the temporal application of procedural statutes, the Council of State (StE) should take into account whether the retroactive application of a procedural statute leads to economic duress for the individuals. Therefore, in that case, the immediate effect of the procedural statute should be ruled to be unconstitutional, at least on the basis of Article 78 para. 2 of the Constitution.

3.9.2.7.a.ii.On substantive law statutes

New tax statutes of substantive law apply ex nunc, i.e. they apply to events giving rise to tax levying that are subsequent to the entry into force of the law. Therefore, the timing of the event giving rise to the tax determines the applicable tax regime. However, the application of tax statutes of substantive law (e.g. of laws regulating the tax subjects and objects, tax rates, etc.)[71] is also retroactively permitted for taxable events that precede the year of publication of the new statute. The same may apply in pending proceedings.[72] Understandably, in both cases this has to be expressly provided for, and in any case, this retroactivity, in case it is unfavourable, is limited in time by Article 78 para. 2 of the Greek Constitution. Therefore, the retroactivity of

66. DEfKom 151/2010, StE 2772/2008, StE 723/2008, StE 3426/2007, StE 2251/2007, StE 3951/2005, StE 3388/2005, StE 3071/2004.
67. Chatzitzanis, *supra* note 58, at p. 75, K. Finokaliotis, *supra* note 24, at p. 129.
68. See for example StE 2371/1997, in which the court did not acknowledge the violation of these rights in the case at issue. For more details, see immediately below, under 3.9.2.7.b.
69. StE 1455/1999.
70. StE 5495/1996, StE 5512-16/1996, StE 2371/1997.
71. In fact, the Greek Constitution compels the regulation of the substantial tax elements by formal statute, i.e. an act of the legislative power, according to the principle of formal legality of taxes (Article 78 paras. 1 and 4) and their provision via regulatory administrative acts is prohibited. Substantial tax elements are those stipulated in the Constitution, i.e. the tax subject and object, the tax rate and the abatements and exemptions from tax.
72. OlStE 1865/1985.

the relevant law may not extend beyond the fiscal year preceding the publication year of the tax statute.[73] The same applies for regulatory administrative acts that refer to tax matters of substantive law.[74] In the latter case, their retroactivity is certainly allowed only if the statute of delegation, on which the relevant administrative acts were based, expressly provides for their retroactivity, as already presented in the section regarding the comparison moment.

A particular case is posed by tax statutes that provide for matters of criminal nature, such as the imposition of tax fines due to tax violations; in this case the following applies: If the new statute is milder than the preceding legal regime, then this milder statute applies also in pending proceedings, unless it (the same new statute) excludes such retroactivity.[75] The same is acknowledged by the case law of the Council of State in cases where a tax statute provides, instead of a tax fine, additional taxes (for the non-submission or late submission of tax declarations) or any other surcharges, due to violation of tax obligations.[76] Nevertheless, the retroactivity of such tax statutes has the following particularities: 1. It is absolutely prohibited with regard to tax fines, when these are unfavourable for the perpetrator of tax violations, given the fact that they have criminal features,[77] 2. Regarding additional taxes and surcharges, their retroactivity is permissible, even when they are unfavourable in comparison with the previous regime, and also apply to pending proceedings, as long as there is an express legislative provision. Yet, this retroactivity is restricted within the time limits of Article 78 para. 2 of the Greek Constitution and the retroactivity of the relevant law may not extend beyond the fiscal year preceding the publication year of the tax statute[78].

3.9.2.7.a.iii. On procedural provisions

Finally, with regard to 'procedural' provisions (i.e. those concerning tax authority competence and those concerning procedure before tax authorities), with regard to their temporal application, the following should be noted: A view was expressed, according to which the time limitation in retroactivity of Article 78 para. 2 of the Greek Constitution does not apply to them.[79] Therefore, based on this view, a new procedural tax provision may be retroactive beyond the fiscal year preceding that of its imposition.

With regard to the immediate effect of procedural provisions on tax obligations that were created before these, this was indeed the case law of the Council of State (StE), both before the 1975 Constitution (i.e. under a constitutional regime that did not prohibit the retroactivity of tax laws in Greece), and under the 1975 Constitution.[80] It is also significant that even if this statute expressly provides for its entry into force in the future, the case law

---

73. For more details, see below under 3.9.3.1 and 3.9.5.1, 3.9.5.2.
74. Non-substantial tax elements may be enacted by regulatory administrative acts that have been issued on the basis of a relevant legislative authorization. These elements are, for example, the obligation of the trader to keep book and documents, the net profit rate as a presumption employed to establish the tax base, the objective value of immovable property, etc.
75. For example StE 4256/2001, StE 3941/2004, StE 3821/2005, StE 2077/2009. *Compare* StE 3941/2004, StE 2210/2003
76. StE 2460/1981, StE 370/ 1983, StE 2672/1984, StE 974/1990. *Compare* also AP 1009/2006.
77. According to Article 7 para.1 2nd sentence of the Greek Constitution, the retroactivity of a more onerous criminal statute is prohibited. Nevertheless, the Council of State (StE) does not invoke Article 7 para. 1 of the Constitution in the case of tax fines, even though it adopts in its case law, – being influenced by the case law of the ECHR – the position that several administrative (tax) sanctions (mostly multiple smuggling duties and a customs fine for the possession of an exempted vehicle by a person that is not temporarily exempt) possess certain features that resemble penalties in the sense of Articles 6 para. 1 and 7 para. 1 ECHR (on multiple duties, see StE 689/2009, DEfKom 151/2010, on a customs fine due to unlawful possession of an exempt vehicle, see StE 2077/2009, StE 1728/2008, StE 463/2008, StE 3919/2006, StE 981/2006, StE 3709/2005, StE 1203/2005, StE 2797/2004), excluding – as contravening Article 7 para. 1 ECHR – the imposition of any sanction preceding the promulgation of the law, by which the sanction is imposed.
78. StE 2460/1981, StE 370/ 1983, StE 2672/1984, StE 974/1990. Compare also AP 1009/2006.
79. Chatzitzanis, *supra* note 58, at p. 76, Finokaliotis, *supra* note 20, at pp. 125-126.
80. See Chatzitzanis, *supra* note 58, at p. 76.

of the Council of State provides that the provision applies as a procedural provision also to the period preceding its entry into force.[81] Besides, it is self-evident that with regard to local competence of tax authorities for issuing the act charging the tax, the reference date is the time that the act was issued and not the time that the tax obligation was created. So, for example, the Council of State (StE) held that in a case of inheritance tax, the reference date for assessing which is the locally competent tax authority to issue the demand for payment of the inheritance tax was not the time of death of the deceased but the time of issue of the act (which took place many years after the death of the deceased). Therefore, where the competence of the authority issuing the fiscal act is concerned, the tax procedural provision has immediate effect.

Nevertheless, there are also cases where case law is probably different. Thus, with regard to the application in time of procedural provisions, there is relevant case law of the Council of State (StE), stipulating that they apply to acts taking place during the time of their effectiveness and not retroactively to previous acts. In fact, even though retroactivity was expressly provided for in the provision, which contained – among other things – the conditions for the submission to the customs office of an application for exemption from duties for destruction of goods coming from the inward-processing procedure, the Council of State (StE) did not apply the relevant procedural provisions to the acts preceding the publication date of the statute. In the grounds of the relevant adjudication a holding was included that it is not possible to overturn all those provisions created earlier under the regime of a different legal framework.[82]

Moreover, for the application of procedural provisions ratione temporis, the Council of State takes into account whether through the retroactive application of a procedural provision leads to the imposition of e.g. a tax fine or of an unfavourable tax charge. In that case, the immediate application of the procedural provision may be held unconstitutional.

3.9.2.7.b. Rules considered to be procedural rules

As already discussed above, if it is more correct in Greece to distinguish procedural rules in a broader sense from those applied in administrative procedure (before administrative courts) and those that govern the administrative – tax procedure (before the tax authorities), it becomes clear that both categories involve issues of competence and procedure.

With regard to the issue of which rules are procedural rules in a broader sense, relevant references are made especially in the case law. Thus, according to the case law of the Council of State (StE), cases of procedure are for example the method of providing power of attorney to a lawyer[83], but also the abolishment of the appellate instance,[84] issues of competence and procedure that should be observed before a court,[85] the obligation to pay the appeal fee. Also the provisions on the possibility of issuing a temporary tax assessment notice, instead of a final one,[86] but also of issuing a complementary tax assessment notice were found to be procedural provisions.[87] Furthermore, other procedural provisions comprise these on the conditions for applying for exemption from levies, as well as the provisions on the procedure of establishment of tax entitlements originating from competent tax authorities, but also the provisions on the competence of the authority issuing the tax act.[88]

---

81. StE 5182/1987.
82. StE 2601/1994.
83. StE 285/1999.
84. *Compare* StE 1455/1999, StE 5495/1996, StE 5512-16/1996, StE 2371/1997.
85. StE 1222/1989.
86. StE 5182/1987.
87. StE 1119/1984, StE 1222/1989, StE 2397/1990 in Chatzitzanis, *supra* note 58, at p. 76.
88. On competence, see StE 3314/1985, StE 626/1986.

More specifically, regarding the rules of evidence and the burden of proof, and whether they constitute procedural rules or not: Regarding administrative-tax disputes, it should be noted that the Council of State (StE) has held that the holding of the evidence procedure before the administrative courts is a procedural act in the sense of Article 178 of the Code of Administrative Court Procedure.[89] In that sense, the invocation and submission of evidence was considered to be a procedural act. Nevertheless, it is worth noting that, according to the case law of civil courts, the admissibility of evidence is inextricably related to the emergence of the dispute at hand. Therefore, it has been ruled that according to the principle the resulting from Articles 5 paragraph 2 sentence d, 20 and 21 of the Law introducing the Code of Civil Procedure, the admissibility of a means of evidence that is inextricably related to the emergence of the dispute at hand is in principle regulated by the statute that is in force at the time of the emergence of the right at hand, or otherwise, at the time that the events to be proved took place.[90]

In any case, the characterization of a legislative act as procedural rule does not necessarily have a definitive impact on the application of the relevant statutes in time; the reason for this is that the application of the particular statutes in time depends also on the general legislative and constitutional framework. Thus, as an example of the admissibility of legal remedies that, while they constitute a procedural rule (that applies before courts), there is a legislative provision (has already said) stipulating that they are regulated by the statute 'that was in force at that time of issuing of the contested judgment', unless there was an express legislative provision to the contrary. It was expressly ruled that the admissibility of legal remedies falls under the jurisdiction and competence of the court before which they are filed, as well as their timely filing.[91] Therefore, a new statute that modifies all issues of admissibility of the legal remedies after the issuing of the contested judgment, does not apply to cases that are issued prior to its adoption, without any express legislative provision. In any event, in the framework of the judicial unconstitutionality review of statutes, should the statute in force be deemed unconstitutional, then it is not applied by the judge, but the statute preceding it applies.

Furthermore, regarding procedural rules applicable before tax authorities there is for example case law by the Council of State (StE) referring to the conditions for submission to the customs office of an application for exemption from duties for destruction of goods coming from the inward-processing procedure.[92] In that case, while the new law granted retroactivity to the relevant conditions for filing an application for exemption from levies, the Council of State (StE) refused to apply this new statute retroactively, as already presented above.[93]

With regard especially to the statute of limitations, it is unclear whether it belongs to the provisions of substantive law or to procedural rules. In my opinion, the statute of limitations is related to the underlying right and for that reason it is an institution of substantive law. In fact, there is case law where the unconstitutionality of the legislative resurgence of an expired statute of limitation was reviewed, in view of Article 78 para. 2 of the Constitu-

89. StE 3542/2001, 3758/2004, 876/2005, 823/2007.
90. *Compare* AP 136/1967, AP 606/1974, AP 1151/1974, AP 496/1975, AP 188/1976, AP 1475/1983, AP 602/1992. It should be noted, however, that this principle does not apply in the commissioning of an expert's report and in the inspection of the place or thing in question as means of evidence, the permissibility of which is assessed by the statute in force at the time of the hearing, as the interested parties did not have knowledge of these means of evidence at the time that the facts to be proved took place. *Compare* AP 496/1975, AP 188/1976 (in Chatzitzanis, *supra* note 24, Article 147, at p. 934).
91. OlStE 654/1993, OlStE 4113/1995, StE 1108/2006, StE 2946/2008.
92. StE 2601/1994.
93. See above under 3.9.2.7.a.iii.

tion,[94] which means that it was conceived as a provision of substantive law. Nevertheless, during the adjudication of the administrative – tax cases, judges examine the statute of limitations first and then proceed to the merits of the case, if the statute of limitations does not apply. In other words, it deals with the statute of limitations as a procedural step. Moreover, the older case law of the Council of State implies its procedural nature, as it invokes a general principle of law, according to which the statute of limitations is regulated as to its commencement and duration by the most recent statute, which also regulates the statutes of limitation that commenced during the time that the previous statute was in force. As these statutes of limitation did not apply they do not constitute a right already acquired, but a mere expectation of that right, which could be modified by law.[95]

3.9.3. Ex ante evaluation of retroactivity

3.9.3.1. Constitutional limitations to retroactivity of tax statutes

In Greece there is no general prohibition of retroactivity of tax statutes, but there are constitutionally-based strict temporal restrictions to this retroactivity. These restrictions are expressly laid down in a constitutional provision that refers exclusively to tax matters. According to the 1975 Constitution of Greece (Article 78 para. 2), a temporal restriction is imposed on the retroactivity of tax statutes in so far as tax charges are levied herewith (levying of tax charges includes the retroactive abolition of a tax exemption). This implies that there is no constitutional temporal restriction on tax abatements. Still, any tax abatement, and especially if imposed retroactively, should not violate the constitutionally established principle of equal treatment in the area of taxation (Article 4 para. 5); otherwise it is unconstitutional on those grounds.

With regard to the constitutional provision on the non-retroactivity of tax statutes, it appears that there is a prohibition of the unlimited temporal retroactivity of tax statutes, in so far as it contains tax charges, i.e. an onerous modification of the tax regime.[96] However, according to the same article of the Greek Constitution, the introduction of a tax statute (including not only the enactment, but also the amendment of a tax provision) is permitted the retroactivity of which does not exceed the fiscal year preceding its year of publication.

In fact, such retroactivity is acknowledged by the Greek Constitution regardless of the kind of tax.[97] Nevertheless, the retroactive levying of consumption tax should be avoided, as it is a tax that is passed over to consumers, as well as because VAT as a Community tax is governed by the principles of Community law, such as for example the Community principle of the protection of citizen's legitimate expectations against the State, which, according to ECJ case law, is on certain occasions violated by tax provisions with retroactive effect.

---

94. DEfAth 1844/2005.
95. StE 1974/1955 in N. Chatzitzanis, *I forologiki nomi (os ermhnefthisan ypo tou Symbouliou Epikratias ke tou Areiou Pagou)* [Tax statutes (as interpreted by the Council of State and the Supreme Court)], Vol. 1 (Thessaloniki 1965), at p. 66.
96. Thus, in the frame of the (judicial) unconstitutionality review of a tax statute, the Council of State (StE) ruled recently in its plenary judgment 1912/2009 (for more details, see below under 4.2) that the enactment of a new retroactive tax statute constitutes an (unconstitutional) onerous modification of the tax regime. Of earlier decisions of the Council of State (StE), see indicatively OlStE 1865/1985, OlStE 1705/1986, StE 4155/1984, StE 2516/1980. It should be noted that the (judicial) unconstitutionality review of a statute in Greece is only performed ex post and not ex ante, and by all courts on their own motion, when a case is brought before them after an administrative complaint; at the same time, the review is incidental and does not result in the abolition of the legislative provision, which is deemed to be unconstitutional ad hoc, but in its non-application in the present case at issue. For more details, see below under 3.9.5 and 3.9.6.
97. *Compare* Finokaliotis, *supra* note 20, at pp. 127-128, no. 282.

However, in Greek parliamentary history the particular temporal restriction of permissible retroactivity until the fiscal year preceding the year of the tax statute's publication did not always apply. Thus, due to the lack of the relevant prohibition in previous Greek Constitutions, including the 1952 Constitution that was in force until the current 1975 Constitution in force[98], retroactivity of tax statutes was permissible, as long as there was an express legislative provision. In particular, the case law of the Council of State – during the exercise of the incidental review of unconstitutionality, which is performed *ex post* in Greece –, acknowledged, on the one hand, that retroactive tax charges are contraindicated by the rules of financial science; however, in conclusive circumstances taxation may be levied retroactively.[99] It should be noted, that, in relation to the retroactivity of tax statutes, case law never defined the notions of 'the rules of financial science' or of 'conclusive circumstances'. In fact, it is expressly left to the absolute (and so exclusive) judgment of the legislator to determine whether these circumstances existed or not.[100] For this reason, case law did not review legislation for unconstitutionality in cases where the legislator considered that there were conclusive circumstances justifying retroactivity. This was the position of both the Council of State (StE)[101] and of the Supreme Court (Areios Pagos – AP)[102]; in its plenary judgment 69/1963 the latter placed upon this power of the legislative the restriction of the reasonable time. According to the above judgment, retroactivity was not to exceed a 'reasonable period of time', which was at the discretion of the courts. This particular judgment stated that the 'reasonable period of time' extended to one year, and grounded this restriction of the reasonable time on the need to establish citizens' confidence in the State[103]. The Council of State had ruled similarly at the time.[104]

Finally, according to the current Constitution in force, it should be recalled that, while the retroactivity of authentic interpretative laws is provided for (Article 77 para.2), i.e. that they apply in parallel with the statute interpreted, the view prevails that the temporal restriction of retroactivity in Article 78 para.2 applies especially in interpretative tax statutes, except for cases of tax abatements, where the authentic interpretative statute applies retroactively since the commencement of the effect of the statute interpreted.

3.9.3.2. **Transition policy of government**

There is no general transitional policy or transitional policy on tax in Greece.

---

98. It should be recalled that during the dictatorship in Greece any kind of retroactivity of tax statutes was banned under Article 82 para. 3 of the junta Constitution of 1968-1974. In fact, the Council of State (StE) had ruled that such a prohibited type of retroactivity was that of a tax statute enacted in 1973 that regulated also the company results of the current fiscal year, i.e. of the 1973 fiscal year, even though the fiscal year of their taxation would be 1974. (StE 1723 /1981, *Armenopoulos* 1982, 5, at pp. 388-389).
99. StE 392/1931. See K. Finokaliotis, *I syntagmatiki katohirosi ton arhon tis nomimotitas ke veveotitas tou forou kai tis apagorefsis tis anadromikotitas ton forologikon nomon,* (The Constitutional entrenchment of the principles of legality and certainty of tax and of the prohibition of retroactivity of tax statutes), (Thessaloniki: Sakkoulas Publications, 1984). See also Finokaliotis, *supra* note 24, at p. 127, no. 449.
100. StE 392/1931, StE 1064/1940, StE 1041/1941, StE 2464/1952, StE 798/1956, OlStE 1604/1957, StE 322/1961 (in Chatzitzanis, *supra* note 95, at p. 33).
101. Finokaliotis, *supra* note 20, at pp. 123-124, no. 275. See StE 1787/1952, StE 322/1968, StE 1097/1969, StE 2863/1979.
102. AP 377/1958, AP 103/1963.
103. See Finokaliotis, *supra* note 20, at p. 124, no. 275, Fortsakis, *supra* note 1, at p. 126, no. 125.
104. StE 3215/1978.

3.9.3.3. **Ex ante control by an independent body**

3.9.3.3.a. Advisory body such as the Council of State
While in Greece both the Council of State (StE) and the Court of Auditors (ES) possess consultative competence, the former in the previous processing of presidential decrees and the latter on pension law bills, nevertheless the contemporary role of the Council of State in tax matters does not appear to be significant. It should be taken into account that, according to the Greek Constitution, only non-substantive elements of tax can be regulated by presidential decree, i.e. matters that do not involve tax subjects or objects, tax rates and tax exemptions.[105] Therefore, the Council of State possesses no consultative power on the substantive elements of the tax, i.e. the subject, the object, tax exemptions and tax rates, which according to the Constitution are established by formal law and not by presidential decree.

3.9.3.3.b. Rules to review retroactivity, grandfathering or favourable retroactivity
Regarding to retroactivity issues of presidential decrees, the main commitment of the Council of State as a consultative institution emanates from Article 78 para. 2 of the Constitution, in case these are of a fiscal nature. As for the rest, there are no restrictions in cases of grandfathering or favourable retroactivity. In any event, because the Council of State as a consultative institution reviews only presidential decrees (which constitute a type of subordinate legislation for Greek standards), then, in order for the presidential decree to be constitutionally retroactive, it is required that the enabling statute on the basis of which it was issued expressly provides for retroactivity.[106]

3.9.4. **Use of retroactivity in legislative practice**

3.9.4.1. **'Legislating by press release'**

In Greece, the phenomenon of 'legislating by press release' is not known.

3.9.4.2. **Retroactive effect further back than first announcement**

Generally the Greek Constitution provides for the basis for temporally restricted retroactivity of tax statutes, even though it is avoided in modern politics, as being politically costly. Thus, retroactivity extending further back than the first announcement is avoided in practice, even though institutionally permitted, as long as it extends within the constitutionally permitted time limits.

Nevertheless, what is noteworthy about Greek reality is that Article 78 para. 3 of the Greek Constitution exceptionally stipulates that consumer tax and duties may be collected from the date on which a relevant bill may be tabled at the parliament, i.e. before voting on the bill takes places, as long as a time-limit for the promulgation of the law imposed by the Constitution is observed. Otherwise, the said taxes and duties already collected since the tabling of the bill are to be refunded as unduly collected. The reason for the exceptional permissibility of the collection of consumer taxes and duties since the date of tabling of the

105. On the principle of formal legality of tax and substantial tax elements, see Theocharopoulou, *supra* note 30, at pp. 110-112 and the relevant footnotes.
106. OlStE 3659/1980, StE 4914/1987.

bill and not since the date of its enactment is the prevention of 'swindling.'[107] In particular, as there are usually press reports some time before the imposition of new taxes and duties, there is a risk that merchants massively import products under the previous tax regime in order to keep them off the market while being aware of the oncoming increase in consumer taxes or duties, and then channel them to the market after the enactment of the relevant statute at a price increased by the respective tax amounts, which, however, merchants were under no obligation to pay.

3.9.4.3. **Pending legal proceedings**

3.9.4.3.a. Influence of retroactive tax statutes

As an introductory note, it should be underlined that the legislature's intervention in pending proceedings should generally adhere to some conditions that the case law has based on provisions of the Constitution and of the ECHR. Moreover, the legislature's intervention in pending proceedings, especially in tax disputes, demonstrates some additional particularities, especially because of the temporal constitutional restrictions on retroactivity.

Regarding the general conditions by which the established case law of the Council of State (StE) considers the legislature's intervention in pending proceedings to be constitutional, the following can be observed: The enactment of statutory provisions with retroactive effect, which is permissible in special cases only by a general and express constitutional provision [in criminal penalties (Article 7 of the Constitution), in taxes (Article 78 para. 2 of the Constitution) etc.] is allowed in principle as long as the retroactivity does not infringe any constitutionally protected rights.[108] What is more, the constitutionally guaranteed principles of the separation of powers (Article 26), of citizens' equality before the law (Article 4), and of the right to judicial protection (Article 20 para. 1) are not infringed, as long as the legal rules are general and impersonal and no final (unappealable) judgments have been issued, nor is the case pending before a court of cassation[109] However, in certain cases, both in earlier case law, especially that of the Court of Auditors (ES),[110] and in recent Council of State judgments,[111] it appears that generally not only lis pendens but also the finality of a case is grounds for banning the legislature's intervention, as there is certain influence of the ECtHR case law on the observance of Article 6 para. 1 sentence a of the ECHR about the right to a fair trial, but only as long as claims are discharged. In any case, with regard to Article 6 para. 1 of the ECHR and tax matters, the the Council of State has ruled mainly on the occasion of contested procedural (tax) legislative acts and not on substantive tax statutes, where Article 78 para. 2 of the Constitution as a rule applies. Regarding procedural statutes and procedural provisions in the Greek legal order, these have been explained in detail above, in the section about statutes having immediate effect and the procedural rules.[112]

The period of retroactivity of tax statutes of substantive law cannot be particularly lengthy in Greece, due to Article 78 para. 2 of the Constitution.[113] Pending proceedings may be affected only if so provided by the relevant statute of substantive law and, in any case,

---

107. The Greek constitutional legislator had in mind a practice of some merchants – especially in the past. From the date the newspapers informed the public that a new consumer tax or a new duty was to be imposed in Greece, these merchants massively imported products in Greece under the previous non tax regime but waited for the imposition regime in order to sale these products in the Greek market at a price increased by the consumer or/and duty taxes which supposed to burden these products from the beginning, although in fact the later never happened.
108. StE 7/1997, StE 2371/1997, StE 5495/1996.
109. StE 1502/1999 (on pension issues), OlStE 542/1999.
110. OlES 2274/1997.
111. StE 241/2009, StE 3801/2003.
112. Under 3.9.2.7.a.i, 3.9.2.7.a.iii and 3.9.2.7.b.
113. See above under 3.9.3.1 and below under 3.9.5, 3.9.5.1, 3.9.5.2.

within the limited time frame of retroactivity of Article 78 para. 2 of the Greek Constitution. Otherwise, the relevant tax statute is unconstitutional and should not be applied by the administration and courts.[114] Certainly, if the tax statute does not contain purely tax provisions, e.g. provisions involving the imposition or modification of a tax rate, tax subjects, objects, tax exemptions etc. but contains provisions for the imposition of tax fines or surcharges or additional taxes, i.e. provisions of a punitive nature, then the following applies: With reference to the provisions imposing a tax fine, additional tax, etc., as already indicated, the case law of the Council of State accepts that a presumption of retroactive effect of the new more lenient statute applies to pending cases, unless this new law expressly excludes it. If this new statute is unfavourable to the perpetrator of tax violations, then in the case of tax fines, the law does not apply to the pending case, as it contravenes the Constitution. In the case of additional taxes, even if this new regulation is unfavourable, it can be applied to pending cases as well, if this new law expressly so stipulates, but this retroactivity cannot exceed the restricted time limits of Article 78 para. 2 of the Greek Constitution.[115]

According to case law, authentic interpretations of tax statutes cover all matters that are not finally (unappealably) adjudicated.

3.9.4.3.b. Pending legal proceedings excluded from application retroactivity?
There is no relevant statistical data on whether pending legal proceedings are excluded from the application of a new statute. It appears that both options occur.

3.9.4.4. **Favourable retroactivity**

Favourable retroactivity of tax laws, i.e. of substantive tax laws (that impose taxes) does not occur frequently, despite its unlimited temporal permissibility under the Greek Constitution to the extent that the fiscal equality principle is not infringed. On these matters, namely in which cases the jurisprudence considers that there is favourable retroactivity and in which cases the retroactivity of tax statutes infringes the fiscal equality principle, there is an extensive analysis in the *ex post* evaluation of retroactivity in case law and particularly in the examination method. Otherwise, even in the case of favourable retroactivity, the intervention of the legislature should respect the principle of separation of powers and the res judicata (as in unfavourable retroactivity as well).[116]

It should be clarified, however, that in the case of additional taxes (due to the imposition of an inaccurate or overdue tax statement)and tax fines, favourable retroactivity is temporally permitted in general, as long as Article 78 para. 2 does not exclude it, and the – favourable or unfavourable – nature of the new statute is (*ex post*) assessed in case law, as we will see below,[117] not from a general aspect but in view of a particular base, i.e. in view of the particular factual background.[118] In fact, it should be recalled that if in the particular case the provision is more lenient, then the administration and courts are under an obligation to apply the latter provision (unless excluded by the same provision).

114. StE 207/1988.
115. StE 2460/1981, StE 370/1983, StE 2672/1984, StE 974/1990. *Compare* also AP 1009/2006.
116. See above under 3.9.4.3.a.
117. See below under 3.9.5.2.
118. StE 3941/2004, StE 4256/2001

3.9.5. **Ex post evaluation of retroactivity (in case law)**

It should be initially clarified that in Greece the review of the unconstitutionality of statutes is performed *ex post* by any court, but only incidentally, i.e. on the occasion of hearing the claim. In other words, citizens cannot file directly against an unconstitutional statute, requesting the recognition of its unconstitutionality. The incidental judicial review of the unconstitutionality of statutes is performed as follows: citizens vested with a legal interest file an action against the act issued in application of the law and, on the occasion of the hearing of the case, there is either an invocation of unconstitutionality of the statute on which the act is based, or the court may on its own motion review the constitutionality of the statute. If a statute is found to be unconstitutional by the said court, then it does not apply it in the particular case, but this ruling does not have an erga omnes effect, as this review is only incidental, specific and determinative. Thus, this statute is not abolished and also another court can rule – on the occasion of another case – that the same statute is constitutional. If a legislative provision is found by the Supreme Special Court (Anotato Eidiko Dikastirio) to be unconstitutional, which is an extraordinary procedure (Article 100 of the Constitution), only then can this adjudication have an *erga omnes* effect,[119] following publication of the relevant judgment or from the time stipulated therein.

Furthermore, regarding the method of reviewing the unconstitutionality of statutes by courts, it should be mentioned that in Greece, judges interpret the law according to the Constitution. This means that if a statute allows room for more than one interpretation, then the court selects the interpretation that is compliant with the Constitution. In this procedure, the methods of legal interpretation that courts are allowed to use are always taken into account. After following the legal methods of interpretation, a law is found to be unconstitutional only if there can be no interpretation that is compliant with the Constitution.[120]

---

119. See also Theocharopoulou, *supra* note 30, at pp. 115 – 116. See also below under 3.9.6 (especially on the role of the Supreme Special Court). Of the Greek literature, especially on the Supreme Special Court, see K. Yiannopoulos, *To Anotato Idiko Dikastirio – me aformi tin apofasi 8/2007 AED* (The Supreme Special Court – in response to judgment 8/2007 of the Supreme Special Court), (Athens: Nomiki Bibliothiki Editions, 2009) (passim). On the unconstitutionality review of statutes in general, see W. Venizelos Ev. – Skouris, *O dikastikos elenhos tis antisyntagmatikotitas ton nomon* (The judicial review of the unconstitutionality of statutes), (Athens-Komotini: Ant. N. Sakkoulas Publishers, 1985), passim, A. Manitakis, *Kratos Dikeou kai dikastikos elenxos tis antisyntagmatikotitas ton nomwn* (The Rule of Law and judicial review of unconstitutionality of laws)(Thessaloniki: Sakkoulas Publishers, 1994), passim, A. Dimitropoulos, *Geniki Syntagmatiki Theoria* (General Constitutional Theory), Vol. A, (Athens-Komotini:Ant. N. Sakkoulas Publications, 2004), at p. 396 et seq., S. Orfanoudakis, *I yperohi tou Syntagmatos enanti tou nomou os apavgasma tou Syntagmatismou* (The supremacy of the Constitution over statutes as a reflection of Constitutionalism) (Sakkoulas Editions: Athens – Thessaloniki, 2008), at p. 175.

120. On the interpretation of statutes in accordance with the Constitution, see studies in D. Tsatsos, ed.,, *I erminia tou Syntagmatos* (Interpretation of the Constitution) (1995), K. Chrysogonos, 'I symfoni me to Syntagma erminia sti nomologia tou Symvouliou tis Epikratias' ('Interpretation according to the Constitution in the case law of the Council of State'), *To Syntagma* (1994), at p. 223 et seq., K. Stamatis,K., 'Erminia ton diataxeon tis nomothesias symfona me to Syntagma me aformi tin StE 4208/1997' ('Interpretation of legislative provisions in accordance with the Constitution in response to judgment 4208/1997 of the Council of State'), *Nomos ke Fysi* 5 (1998), at p. 87 et seq., D. Filippou, 'I thriskeftiki isotita ke i arhi tis symfonis me to Syntagma erminias ton nomon' ('Religious equality and the principle of interpretation in accordance with the constitution'), *Dikeomata tou Anthropou* (2000), at p. 689 et seq.

3.9.5.1. **Testing against the Constitution and legal principles**

In Greece courts review the retroactivity of a tax statute for its eventual unconstitutionality, but also for the violation of general principles of the law, especially if the latter are considered to be constitutionally established.

In detail, regarding the review of the retroactivity of a tax law based on the Greek Constitution, it appears that: Due to the existence of Article 78 para. 2, which determines in particular when the retroactivity of a tax statute is prohibited, the constitutionality review of a tax statute is in general performed by the courts on the basis of that article. However, at the same time, if it is a case of retroactivity of tax abatement, which is not hindered by Article 78 para. 2, the retroactivity of this tax exemption may be held to be unconstitutional on the basis of Article 4 para. 5 (of the Constitution) on equality in tax matters if the conditions imposed by the principle of equal treatment are not met. In any event, if there is a case of favourable retroactivity in general, the temporal restriction of Article 78 para. 2 of the Constitution does not apply to tax statutes. For example, with regard to provisions on determining a new tax base, the case law is as follows: these are indeed subject to the temporal restriction of Article 78 para. 2 of the Constitution, but if the modification in identifying the net taxable income by a retroactive statute does not lead to a heavier taxation for taxpayers, then retroactivity is permissible.[121]

With regard to tax fines, potentially Article 7 para. 1 of the Constitution on the prohibition of retroactivity of unfavourable penal provisions[122] is now taken into account by the recent case law of the Council of State, despite the fact that express reference to the article is always avoided. This can be attributed to the fact that, in earlier case law of the Council of State, tax fines were considered to be administrative sanctions and not criminal law penalties.[123] It was thus ruled that the levying of a multiple duty (by a customs authority) for smuggling constitutes an administrative sanction,[124] while Article 7 of the Constitution refers only to criminal statutes; therefore Article 7 of the Constitution does not apply to tax fines.[125] Nevertheless, the recent case law of the Council of State (during the last five years) makes references to Article 7 para. 1 of the ECHR.[126] In this light, certain provisions were found by the Council of State to be violating Article 7 para. 1 of the ECHR; these provisions involve the imposition of a fine due to the possession of a vehicle that was tax exempt according to Community law provisions, by a person that was not provisionally exempt, as the statute required[127] Also, multiple smuggling duties were found by the Council of State to possess features of Articles 6 paras. 1 and 7 para.1 of the ECHR.[128] In any event, even the tax legislator respects this prohibition and avoids granting retroactive effect to tax fines.

The retroactivity of interpretative statutes is reviewed by the Council of State, based on Article 77 para. 2 of the Constitution, which prohibits the retroactivity of pseudo-interpretative statutes, and it is limited, if unfavourable, by the temporal restriction of Article 78 para. 2 of the Constitution.[129]

Furthermore, the following can be observed about the statute of limitations: administrative courts and the Council of State (StE) in Greece have declared tax statutes extending

---

121. StE 2001/1976, see Finokaliotis, *supra* note 24, at p. 129.
122. According to Article 7 para.1 of the Greek Constitution, no crime will occur, nor may punishment be inflicted unless specified by law in force prior to the perpetration of the act defining its constitutive elements.
123. StE 1253/1992, OlStE 3278/1992, StE 1562/1979.
124. StE 2905/1997, StE 3611/2003, OlStE 990/2004.
125. StE 2905/1997.
126. StE 2077/2009, StE 3537/2008, StE 1203/2005, StE 2797/2004, StE 2470/2003.
127. StE 3537/2008.
128. StE 689/2009, DEfKom 151/2010, DEfAth 2924/2007.
129. See above under 3.9.2.3.a.i, 3.9.2.3.a.iii, 3.9.3.1 and 3.9.4.3.a.

the statute of limitations shortly before expiry to be non-retroactive and constitutional.[130] If, however, the statute of limitations has expired, the new statute extending it is unconstitutional.[131] It is also significant that the unconstitutionality of 'the extension of the statutes of limitations' as a time-limit for prescription was assessed in a judgment on the basis of Article 78 para. 2 of the Constitution,[132] i.e. by the criteria employed in Greece to review statutes of substantive tax law, while in another judgment[133] a different grounds was used: that the potential application of a provision on debts already prescribed before its entry into force would primarily contravene the principle of the rule of law, as well as the constitutional principles of legal certainty and legitimate expectations deriving from it (especially from Articles 2 para.1 and 5 para. 1 of the Constitution).

With regard to the principles of legal certainty and of legitimate expectations, it appears that in recent years the Council of State reviewed a retroactive tax statute with regard to the rule of law and the individual constitutional principles of legal certainty and of legitimate expectations that derive from it.[134] It is established nevertheless that in the recent cases before the Council of State – where the court had the opportunity to rule in a relevant matter, taking into account that the principle of legitimate expectations is more frequently invoked by the claimant – the court, when adjudicating on the potential incompatibility of the tax law with the said principle, usually rules that there is no such incompatibility.[135]

Furthermore, when there is a case of a tax statute that involves a matter of Community law, such as e.g. VAT as a Community tax, then the principles of Community law, such as the Community law principle of protected legitimate expectations of the citizens against the State are taken into account.

With regard to procedural provisions applied in pending tax proceedings, the case law of the Council of State reviews this retroactivity not in relation to Article 78 para. 2 of the Constitution, but in relation to the constitutional principle of equality (Article 4) and the citizens' constitutional right to judicial protection (Article 20 para.1). These matters are certainly taken into account in general by the Council of State, when adjudicating on legislative provisions, even of substantive law, that apply on pending proceedings. Finally, the application of a statute on pending proceedings may not violate the constitutionally established principle of separation of powers (Article 26).[136]

In any case, beyond the issue of judicial review of the retroactivity of a tax statute (as already discussed), another issue is important to the Greek legal order that involves not the retroactive enactment of tax by the legislature, but the retroactive charging of tax by the administration, and the judicial review of the compatibility of any retroactive charging of tax with the general principles of sound administration: the *ex post* judicial review – as already indicated, this is the method of judicial review employed in Greece – of the retroactive charging of tax by the tax administration against a certain taxpayer, who, however, had been exempted in the past by the tax administration itself, due to erroneous interpretation of the tax legislation. In particular, while it is in principle accepted that the Greek tax administration may retroactively charge taxes, in case it is ascertained that some taxpayers were tax exempt due erroneous interpretation of the tax statute, there is a bar to it: the

130. StE 4710/1984, StE 2866/1985, StE 3141/1985, StE 1104/1992, StE 523/2000, StE 858/2002. *Compare* StE 1508/2002.
131. DEfAth 1844/2005, compare StE 1508/2002.
132. DEfAth 1844/2005.
133. StE 1508/2002.
134. Accordingly StE 1508/2002, in which the Council of State recognized as a judicial body the principle of legitimate expectations as a constitutional principle. However, this principle had been invoked in earlier case law of the Council of State, yet not in tax matters.
135. For example StE 171/2006, OlStE 2469/2008.
136. For more details, see above under 3.9.2.4.a, 3.9.2.7.a.i and 3.9.4.3.a.

principles of sound administration [general principle of law that is not constitutionally established in Greece, but is now a fundamental right contained in the Charter of Fundamental Rights of the European Union (Article 41]. The relevant case law of the Council of State (StE) accepts that the principle of sound administration hinders retroactive charging and, consequently, the retroactive collection of the respective tax is accepted only under particularly strict (special) conditions.[137] It should be noted that a recent case before the Council of State reviewed, not only in relation to the general principle of sound administration, but also in relation to the Community principle of legitimate expectations, the permissibility or impermissibility of the retroactive charging of VAT (against a taxpayer) on the side of the administration, while the taxpayer had been exempted by the tax administration for that period due to erroneous interpretation of the tax statute.[138]

Finally, one should mention the particular case of the exceptional collection of consumption tax and duties – permitted by the Greek Constitution in Article 78 para. 3 – since the time of the tabling of the relevant bill in the parliament, i.e. before enactment of the statute. In this case, the relevant statute has to be promulgated within a certain time-limit determined by the Constitution. Otherwise, all taxes collected are considered to be unconstitutional and therefore, unduly collected and are to be refunded. Nevertheless, had the relevant statute not been promulgated in a timely way in the past, governments used to submit to the parliament a new law with the exact same content and grant retroactive effect to it, within the permissible temporal limits of Article 78 para. 2 of the Constitution. As a result, by enactment and promulgation of the relevant retroactive tax statute, all unduly collected taxes would be a posteriori 'legitimized', in order to avoid refunds. The Council of State ruled that such statutes were constitutional,[139] despite the fact that by such a ruling it accepted the breach of a constitutional provision (i.e. of Article 78 para. 3), by another constitutional provision (namely Article 78 para. 2).

3.9.5.2. **Examination method**

As already clarified above, in Greece courts interpret the law according to the Constitution. This means that if a statute through its provisions allows room for many interpretations, then the court selects the interpretation that is compliant with the Constitution. In this procedure, the methods of legal interpretation that courts are allowed to use are always taken into account. After following the legal methods of interpretation, a law is found to be

137. It is required that it be a consumer tax for which taxpayers during a long period of time had a constant and justified conviction, due to positive actions of the Administration (interpretative circulars, audit reports, written responses by the Administration to relevant questions), that they are not subject to this tax, a fact that resulted in taxpayers not passing the tax over to consumers. At the same time, taxpayers have to prove that the financial stability of their enterprise is jeopardized, should they be called on to pay the said tax retroactively. To prove the concurrence of the risk to the financial stability of their enterprise, taxpayers have to invoke concrete facts occurring at the critical time of issuing of the tax assessment that relate to the general financial state and potential of the enterprise and in view of which the financial stability if the enterprise is at risk. There is abundant case law of the Council of State on the above matters, see El. Theocharopoulou, 'Idieterotites kata tin efarmogi ton forologikon nomon apo ti Forologikh Dioikisi ke to dikasti se schesi pros tin efarmogi ton diikitikon nomon – ipo to fos tis nomologias StE, AED, DEK' ('Particularities during the application of tax statutes by the Tax Administration and courts in relation to the application of administrative statutes – also in light of the case law of the Council of State, the Supreme Special Court and the European Court of Justice'), in: *Haristirio eis Louka Theocharopoulo ke Dimitra Kontogiorga – Theocharopoulou (Liber ad honorem of Loukas Theocharopoulos and Dimitra Kontogiorga – Theocharopoulou – Volume III)* Nomos, No. 10, (Thessaloniki: Aristotle University of Thessaloniki, 2009), at pp. 228-229.
138. On the principle of legitimate expectations in the case law of the Council of State, see below under 3.9.5.4.
139. StE 4225/1988, *Diikitiki Diki* 1989, at p. 948.

unconstitutional only if there can be no interpretation that is in compliance with the Constitution.

Regarding the review of the unconstitutionality of tax statutes, it appears that their interpretation according to the Constitution mainly results from the application of the narrow interpretation of tax provisions. It should be noted that the Council of State applies, as a matter of principle, the narrow interpretation of tax provisions,[140] due to the constitutionally established principle of the formal legality of tax (Article 78 paras. 1 and 4 of the Constitution). Therefore, the incongruence of the retroactivity of a tax statute to the Constitution and to the constitutionally established general principles of the law may also result from the narrow interpretation of tax statutes, only if within this framework its interpretation according to the Constitution is not possible. At the same time, the specific provision is used rather than the general one, even in cases when the general provision is posterior to the specific one.[141] In fact, a special law may be abolished by a posterior statute only by express provision.[142] Should the provision be found to be unconstitutional, courts are not to apply it (but usually apply instead a provision previously in force, without prejudice to the application of the constitutional provision of Article 78 para. 2 especially in tax matters).[143]

At the same time, especially with regard to the judgment on the incongruence of the retroactivity of the substantive tax statutes to the Constitution, courts review the unfavourability of the new retroactive tax statute, i.e. the onerous modifications of the tax regime,[144] only if this retroactivity exceeds the constitutionally imposed temporal limits. The temporally unlimited retroactivity of the unfavourable tax law is prohibited, according to Article 78 para. 2 of the Constitution. At this point it should be recalled that Article 78 para. 2 provides that 'A tax or any other financial charge may not be imposed by a retroactive statute effective prior to the fiscal year preceding the imposition of the tax'. In other words, in order for a tax statute to be unconstitutional, the following two cumulative conditions should be met: Firstly, it should be unfavourable, and secondly, it should exceed the constitutionally determined permissible period of retroactivity. Therefore, tax exemptions may as a matter of principle have unlimited retroactivity.

At this point, it is worth referring in more detail to the interpretation given by the Council of State on the occasion of hearing tax cases with regard to the method of calculation of the temporal restriction of constitutionally permissible retroactivity under Article 78 para. 2. First of all, the tax may not have retroactive effect extending beyond the fiscal year preceding the year of the publication of the statute imposing the tax. In particular, the following holding has been handed down: the fiscal year preceding the publication year of the relevant tax statute was found to be the fiscal year during which the tax object was acquired, and not the fiscal year during which the tax object is subjected to taxation, according to the relevant provisions.[145] Therefore, if, for example, the law imposing income

---

140. On the interpretation of fiscal provisions in general (including also tax provisions), it is interesting to see the recent paper by N. Milionis, *'Zitimata erminias ton dimosionomikon diataxeon: Theseis kai anaskeves'* ('Interpretation issues in fiscal provisions: Views and disaffirmations') in: *Haristirio eis Louka Theocharopoulo ke Dimitra Kontogiorga – Theocharopoulou (Liber ad honorem of Loukas Theocharopoulos and Dimitra Kontogiorga – Theocharopoulou – Volume I)* Nomos, No. 10, (Thessaloniki: Aristotle University of Thessaloniki, 2009), at pp. 461-476.
141. For example compare StE 2624/1998.
142. StE 252/1988, StE 2624/1998, StE 3003/2001, StE 2591/2007, StE 2455/2008, StE 692/2009.
143. On unconstitutionality review, see for more details below under 3.9.6.
144. Out of the recent case law of the Council of State, see indicatively OlStE 1912/2009, but also earlier judgments OlStE 1865/1985, OlStE 1705/1986 and StE 4155/1984, StE 2516/1980.
145. Accordingly, in judgment OlStE 1865/1985, it was held that Law 231/1975 that contained a retroactive restriction of an existing income tax abatement published on 6 December1975, could not apply retroactively to income incurred during a business period that expired before 1 January 1974. Judgment StE 648/1995 is in the same spirit but is based on a different background and legal framework.

tax is published in 2010, the retroactive taxation of income derived in 2008 is prohibited (despite the fact that the tax declaration for this income is submitted in 2009), but income derived in 2009 may be taxed. It was also held (in a case of purchase of immovable property) that the relevant tax imposed on the transfer of property imposed by a statute with retroactive effect may not extend beyond the fiscal year preceding the year of publication of the statute, where the preceding year is considered to be the year in which the taxable legal relationship came about.[146] Recently, the Council of State ruled in plenum that the legislative provision published in 1998 (Article 8 of Law 2579/1998), according to which tax-exempt reserves formed before 1 January 1997 are retroactively taxed, is also unconstitutional due to non-permissible retroactivity.[147]

As to the unfavourability of the retroactive tax statute, this results from a comparison between the new tax regime that is retroactively enacted and the previous regime. Thus, the retroactive abolition or limitation of an existing favourable tax regime,[148] the favourable deprivation of the right to select a special tax regime[149], the retroactive limitation of tax-exempt expenses[150], the special compulsory retroactive closure of pending real estate tax cases, in the sense of a retroactive compulsory determination of the value of immovable property (and in comparison to the previous rule), which might eventually lead to an increase of the tax assessment of property that is subject to real estate tax[151] etc. were all found to be unconstitutional. Especially in pending cases, courts will compare the new retroactive statute and the previous one to ascertain whether the new statute applies and until when it may be applied.[152]

However, the comparison between the previous and the retroactive tax statute and the judgment on the unfavourability of the retroactive tax regime is not always equally clear. Thus, in recent case law of the plenum of the Council of State involving reserves, it was found that the new provision that retroactively imposed income tax on the reserves of these companies is unfavourable, irrespective of the fact that new, lower (than those applicable at the time) tax rates had been enacted.[153] But in that case the fact was also taken into account that the new tax statute for the first time laid down retroactive taxation on reserves that were temporarily exempt, because they had not been distributed or capitalized. In particular, it was held that this new provision constitutes a retroactive onerous change of the tax regime of these companies, because income tax is levied directly and compulsorily on a tax base that during its formation and the publication of the above statute was tax free, and its taxation depended on future facts that were related to the will of these companies.

It was ruled that the legislative prohibition of refund to taxpayers of taxes that were unduly collected due to the imposition of taxes that was based on invalid provisions also constitutes a case of retroactive imposition of tax in the sense of Article 78 para. 2 of the Constitution[154].

With regard to the enactment of a retroactive tax abatement, this is initially accepted without limitations, as long as it does not violate the constitutional principle of equal treatment in tax matters (Article 4 para. 5 of the Constitution). According to this principle, there has to be equal tax treatment of similar situations and unequal tax treatment of unequal

146. StE 600/2003.
147. OlStE 1912/2009, StE 1467/2010.
148. StE 1781/1978, OlStE 1865/1985, OlStE 1705/1986, OlStE 2139-2150/1989.
149. StE 2516/1980.
150. StE 4155/1984.
151. OlStE 2863-2871/2003.
152. On this matter, see above under 3.9.2.7.a and 3.9.4.3.a.
153. OlStE 1912/2009, StE 1467/2010 accordingly.
154. StE 422/1981, StE 2285/1981, StE 2630/1981 (see in N. Chatzitzanis, *supra* note 58, at p. 72), StE 1104/1992.

situations, while tax allowances do not breach this principle if justified by reasons of public interest.

The case law of the Council of State is of particular interest in cases of tax exemptions that were enacted in breach of EU law and were subsequently found to be invalid. The provisions that formed the basis for the refund of the unpaid taxes (due to a previously established tax exemption that is contrary to EU law) were not found to be governed by Article 78 para. 2 of the Constitution. Thus, taking into account the ECJ case law on prohibited State aids,[155] the Council of State held that Article 78 para. 2 of the Constitution is not violated in the following case: when a statute is enacted aiming at the retroactive levying of taxes beyond the permissible limits of Article 78 para. 2 on a certain category of companies that had been unlawfully exempted in the past, given the fact that this tax exemption was found by the ECJ to be a prohibited State aid. However, the reasoning employed by the Council of State to establish that the refund of the contribution does not fall within the scope of Article 78 para. 2 of the Constitution was partly diversified over time. Thus, initially this quest for taxes was held by the Council of State to not constitute a retroactive abolition of a tax exemption, but instead that Article 78 para. 2 of the Constitution aims at ensuring legal certainty and does not refer to the adoption of measures that are imposed by EU law.[156] Subsequently, while the Council of State case law continued to not subject these cases to Article 78 para. 2, it made a turn as to the reasoning by adjudicating that such provisions on tax collection do not constitute an abolition of tax exemptions but that these provisions on exemption from the said tax obligation were ab initio invalid, due to imcompatibility with Article 92 para. 1 of the EC Treaty.[157]

With regard to the review of the incongruence of a tax statute in relation to Community law, the following is to be observed:The retroactive levying of consumption tax should be completely avoided, as it is a tax that is passed over to consumers,[158] as well as because VAT as a Community tax is governed by the principles of Community law, such as for example the Community principle of the protection of citizen's legitimate expectations against the state, which according to ECJ case law, is on certain occasions violated by tax provisions with retroactive effect.[159]

Furthermore, as already mentioned earlier,[160] the practice of the Greek tax legislature to extend the statute of limitations for the state's fiscal claims before it expires has been repeatedly held by the case law of the Council of State to be constitutional. According to this case law, as long as the extension of the statute of limitations is granted before its expiry, then this law is not retroactive and it is constitutional.[161] On the contrary, if the statute of limitations expires and its extension is then provided for in a new statute, then this is a case of unconstitutional retroactive levying of tax.[162]

With regard to the unconstitutionality of procedural statutes in tax law, this is assessed, as already mentioned, not on the basis of Article 78 para. 2 of the Constitution, i.e.

---

155. In fact, the ECJ judgment against Greece (of 10 June 1993) for breaching Community law played an important role, as Greece did not comply with a Commission decision on the invalidity of aids granted to exports by its enterprises in the form of tax exemptions, see case C-183/1991 Commission/ Greece [1993] ECR 1993, p.I-3131.
156. StE 1957/1999. The judgment of the Council of State at hand was handed down after taking into account the relevant case law of the ECJ, especially in case C-183/1991 Commission/Greece [1993] ECR 1993, p.I-3131 (see previous footnote) and in case C-387/1992 Banco Exterior de Espana/Ayuntamiento de Valencia [1994] ECR 1994, p. I-877 (where it was ruled that tax exemptions may constitute State aids).
157. StE 115/2004, StE 49/2006. Compare also StE 1861/2004 and StE 1333-1335/2002.
158. Finokaliotis, *supra* note 24, at p. 131.
159. See below under 3.9.5.4.
160. Under 3.9.5.1.
161. StE 4710/1984, StE 2866/1985, StE 3141/1985, StE 1104/1992, StE 523/2000, StE 858/2002. Compare StE 1508/2002.
162. DEfAth 1844/2005, compare StE 1508/2002.

not on the basis of the temporal restrictions applied to the retroactivity of an unfavourable tax statute, but on the basis of other constitutional provisions, such as for example the citizens' right to the provision of judicial protection (Article 20 para. 1 of the Constitution) or the principle of separation of powers (Article 26 of the Constitution). Thus, a statute imposing the payment of a corresponding appeal fee (2%) on the object of the dispute in monetary tax disputes, without determining at the same time a relevant upper limit to this fee, was found to be unconstitutional and therefore inapplicable in the case at hand. This ruling was justified by the fact that this provision contravenes that of Article 20 para. 1 of the Constitution (on the citizens' right to judicial protection) and it is therefore inapplicable in every case, because, depending on the object of the dispute, it may result in such a high appeal fee, that it exceeds the purpose of its imposition and renders the filing of the appeal excessively difficult.[163] In contrast, the statute imposing a fixed fee of EUR 9 was found to be constitutional and thus applicable. The same applies to the statute that even retroactively limited the appealability of first instance judgments by determining a minimum amount of the dispute (thus covering pending proceedings as well). It was ruled in particular that the enactment of such a law does not breach the constitutional principle of equality (Article 4 para. 1 of the Constitution), nor the right to judicial protection (Article 20 para. 1 of the Constitution), given the fact that the retroactivity of this statute was based on a general and objective criterion that applied to all appeals still pending before administrative courts of appeal but which had not been heard yet (at the time that the statute was published). The Court made it clear in this respect that 'an acquired procedural right of the appellant' is not created merely by the fact of filing an appeal against a first – instance judgment, and that such a statute does not violate the 'principle of the lawful judge' established in Article 8 of the Constitution, because the limitation of the appealability of judgments does not constitute a removal of a case from the competent court but a permissible regulation of pending cases.[164] It was also ruled that such a statute does not contravene Article 6 para. 1 ECHR.[165]

As far as tax fines are concerned, in recent years the Council of State reviews their retroactivity in relation to Article 7 para. 1 ECHR. Thus, any legislation imposing a retroactive fine, i.e. for violations that took place before the publication of the relevant statute in the Government Gazette and referring to the import of a private passenger vehicle which was imported with certain deductions, whereas its owner was not entitled to the temporary exemption provided by the statute, was found to contravene Article 7 para. 1 ECHR and therefore to be inapplicable.[166] In contrast, the same legislation was found to be compatible with Article 7 para. 1 ECHR and thus to be valid, with regard to violations perpetrated after the publication in the Government Gazette of the relevant statute imposing the sanction – fine.[167]

It should furthermore be recalled that when it comes to tax fines and additional taxes (due to the submission of an overdue or inaccurate tax return), the general principle of retroactive application of the more lenient law applies[168] (unless that same law clearly excludes retroactivity). With regard to the examination method employed by case law in the assessment of the favourability in the nature of the more recent law for taxpayers, it should be noted that its comparison to the statute that was in force at the time that the tax obliga-

163. OlStE 3470/2007, StE 58-59/2010, StE 1901/2009, StE 1734/2009, StE 204/2009, StE 556/2008, StE 404/2008, StE 276/2008.
164. OlStE 3621/1995, StE 1277/1996.
165. StE 5495/1996, StE 5512-26/1996, StE 2371/1997.
166. StE 3537/2008. See also StE 2077/2009.
167. StE 3537/2008.
168. For example StE 4256/2001, StE 3941/2004, StE 3821/2005.

tion arose does not take place on the basis of an objective judgment of the two statutes in their entirety, but specifically, i.e. in view of the facts of the case at issue.[169]

3.9.5.3. Testing against Article 1 of the First Protocol ECHR

With regard to a tax issue, the Council of State has in fact not ruled to date on a violation of the said article.

Nevertheless with regard to retroactivity, the Council of State reviewed for its compatibility with Article 7 para. 1 ECHR the legislation that imposed fines retroactively, i.e. for violations that took place before the publication of the relevant statute in the Government Gazette and referring to the import of a private passenger vehicle, which was imported with certain deductions, whereas its owner was not entitled to the temporary exemption provided by the statute.[170]

3.9.5.4. Examination method for testing against principle of legal certainty

In the framework of the review of unconstitutionality of laws, and of the eventual violation of Community law by a formal statute or a regulatory administrative act, courts are in a position to review whether the retroactivity of a statute breaches the principle of legal certainty and in particular the principle of legitimate expectations. In this case the following distinction can be made: the judicial review of the adherence to the principle of legitimate expectations by the tax legislator or by the tax administration.[171]

In particular, in the case of tax statutes, whether these are(parliamentary) statutes or secondary legislation, the Council of State has occasionally reviewed their retroactivity in relation to the principle of legitimate expectations, without, however, accepting that there is a violation of the principle. The long-term preservation of a tax regime that is favourable to a specific group of persons does not constitute any obstacle to its modification.[172] In fact, reference to that was made in a certain case, not only to the principle of legitimate expectations, but also to the principle of legal certainty, without ruling in the end that either of the two principles was breached.[173]

However, it is interesting to present as part of the recent Greek case law the cases in which the Council of State reviewed not the retroactivity of the tax legislation, but the retroactive charging of tax by the tax administration in relation to the principle of legitimate expectations.[174] More precisely, these were cases where the tax administration retroactively charged VAT to the expense of a company that had not been charged with VAT until then, due to erroneous interpretation and application of the law on the side of the administration. In these cases, the Council of State accepted that the tax administration is obliged during the application of VAT as a Community tax to observe the Community principle of the citizens' legitimate expectations against the state. In fact, the Council of State determined for the first time in judgment 426/2007 the conditions that need to be met according to the case law of the ECJ for the application of the principle of legitimate expectations. In particular, the Council of State, relying on the relevant judgments of the ECJ on its request

---

169. StE 4256/2001, compare StE 3941/2004.
170. StE 3537/2008. See also StE 2077/2009.
171. See El. Theocharopoulou, *supra* note 137, at pp. 215-219, 231-234. On the principle of legitimate expectations in Greek case law and theory generally, see the studies in the legal periodical Dikeomata tou Anthropou, Special edition: Kratos Dikeou ke prostatevomeni empistosyni (Rule of law and legitimate expectations), Vol. I, (Athens: Ant. N. Sakkoulas Publications 2003).
172. StE 171/2006.
173. StE 1508/2002. See immediately below 3.9.5.5.
174. StE 426–430/2007, *compare* StE 2825-2829/2007. See Theocharopoulou, *supra* note 137, at pp. 217-218, 231-234.

for a preliminary ruling,[175] held in this judgment that there has to be good faith on the side of the taxpayer with regard to the tax exemption, so that the taxpayer a) could not recognize the inaccuracy of the information provided by the national tax authority and b) the administrative act, by which information was granted to him with regard to the tax was by itself conducive of good faith on the side of the taxpayer regarding the tax exemption. Nevertheless, the Council of State did not finally rule in its judgment 426/2007 on the violation of the principle in this case, but remanded the case for adjudication to the Administrative Court of Appeals.[176]

Judgments 2825-2829/ 2007 of the Council of State are worth mentioning. In these rulings, the Court accepted for the first time in a VAT case a breach of the EU law principle of legitimate expectations of businessmen. In these cases, actions of the tax authorities amounting to the receipt of periodical VAT returns and statements of account could have led a wise businessman to have legitimate expectations as to the amount of VAT to be returned. In particular, this was the case of a company that claimed to have submitted from 1992 to 1997 all periodical VAT returns and statements of account to the competent tax authority, which, even though it received them, did not notify the company about the applicable (regular) VAT rate, but only in 1998 did it issue a notice of assessment of the tax using the regular VAT rate. In other words, the company repaid until then the output tax with a reduced VAT rate, considering that items (viz. ice cubes) sold were subject to the reduced VAT rate as is water, while the tax authority received all relevant returns over the years without notifying the company about the applicable VAT rate.

3.9.5.5. **Interpretations by courts to avoid retroactivity**

Courts in Greece interpret statutes in compliance with the Constitution and, in this framework, if they have the possibility, they will select the interpretation which will lead to the avoidance of the retroactive effect of a statute, especially if the retroactive application of a statute raises constitutionality issues. An exemplary case for this is that of the Council of State 1508/2002, in which the Court ruled on the constitutionality of a provision that was in effect from 12 September1997 and extended the statute of limitations for uncontested debts at tax offices (towards the state and third parties), which were to prescribed in the years 1997 and 1998. The provision was found to be constitutional, as the Council of State by strict interpretation of the relevant provision accepted that this provision implies that it does not cover all debts of 1997, but only these for which the statute of limitations had not expired at the time of publication of this law (thus, the debts whose statute of limitations expired from 12 September 1997 onwards).[177] In the opposite case, i.e. if the provision comprised all debts of 1997, the Council of State expressed the opinion that the constitutionally guaranteed principle of the rule of law would thus be violated, along with the principles of legal certainty and legitimate expectations deriving from it.

---

175. Joined cases C-181/04 to 183/04 Elmeka NE/Minister for Economic Affairs [2006] ECR 2006, p.I-8167.
176. StE 426/2007. It should be noted, that when adjudicating a petition for cassation, the Council of State as a cassation court lacks competence to investigate the facts of the case, but may set aside the final judgment (issued in the present case by the Court of Appeals) due to misinterpretation or misapplication of the law or due to defective statement of the reasons in the final judgment (of the Court of Appeals in the present case).
177. See Sp. Vlachopoulos, 'I arhi tis prostatevomenis empistosynis tou diikoumenou kai i symfoni me to Syntagma erminia ton nomon' ('The principle of legitimate expectations and the interpretation of statutes according to the Constitution'), *Dikeomata tou Anthropou*, Special edition, Vol. I, op. cit., 2003, at p. 239 et seq.

3.9.5.6. **Reasons for lack of judicial limits to retroactivity**

The Constitution in Greece imposes certain restrictions to the retroactivity of tax statutes, which are interpreted by the case law, as already discussed above.

3.9.6. **Retroactivity of case law**

In Greece, the court's judgment on tax law matters is binding upon the parties, i.e. tax administration and the taxpayer. In particular, if this judgment annuls or modifies the administrative act by which tax or a tax fine was imposed upon the particular taxpayer, this judgment is binding upon the administration and any other public authority, as well as courts, and involves the particular taxpayer that filed an appeal. Nevertheless, the annulment or modification by the judge of the administrative act imposing tax or a tax fine applies retroactively, i.e. since the issuing of the said act, thus resulting either in a refund with interest of the taxes that were unduly paid, or the payment to the state of the taxes that were not charged or paid until the day of the hearing of the case. If the annulment of the act charging the tax is due to the unconstitutionality of the statute that was the basis for its issuing, it should be clarified that the ruling on unconstitutionality does not produce an erga omnes and a res judicata effect. The reason is that this is a case of incidental review of unconstitutionality[178]. The judicial review of the unconstitutionality of statutes in Greece takes place only *ex post*; it is diffuse, incidental, ad hoc and determinative. The review of the unconstitutionality of statutes in Greece is not incidental, but main, concentrative and abstract, with an erga omnes effect[179] in only one case: when two contradictory judgments are issued by two supreme courts in Greece (e.g. Council of State and Supreme Court, or Council of State and Court of Auditors, or Supreme Court and Court of Auditors) regarding the substantive (un)constitutionality of a law. As there is doubt as to the constitutionality of a statute due to the contradictory judgments, then the matter is introduced for adjudication on the controversy – based on Article 100 of the Constitution – before the Special Higher Court (Supreme Special Court) and its ruling on the unconstitutionality of the particular provisions results in its declaration as invalid (erga omnes, naturally). In the first approach, this is a case of substantive exercise of legislative power by the Supreme Special Court, while in the second approach, it is a case of judicial sanctioning of the legislature, due to unconstitutionality of a legislative provision. In any event, the erga omnes invalidity of a provision is not retroactive.[180]

178. Instead of others, see Yiannopoulos, *supra* note 119, at pp. 170 – 171 and the relevant bibliography.
179. Compare OlStE 1937/1998, paragraph 10. See A. Manitakis, *Elliniko syntagmatiko dikeo – Themeliodis enies* (Greek constitutional law – Fundamental notions), Vol. I (Thessaloniki: Sakkoulas Publications, 2004), at pp. 465-467, Venizelos Ev. – Skouris, *supra* note 119, at pp. 60 et seq., 68, H. Chrysanthakis, E. Galani, and P. Pantazopoulos, *Isigisis syntagmatikou dikeou. Organosi tou Kratous. Atomika ke kinonika dikeomata, ESDA (*Lectures on constitutional law. State organization. Civil and social rights, ECtHR) (Athens, 2007), at pp. 39 – 40.
180. Cf. A. Dervitsiotis, *Simiosis Syntagmatikou Dikaiou (*Notes on Constitutional Law)(Athens: Law and Economy, P.N. Sakkoulas Publications, 1998), at p. 154.

3.9.7. Views in the literature

3.9.7.1. Opinions regarding retroactivity

In Greece there is no diversity regarding the opinions expressed in the literature in reference to retroactivity of tax statutes. The prevailing opinion accepts that the Constitution expresses the public sense of justice and therefore the legal academic world does not feel the need to investigate the possibility of its reform. On the contrary, legal scholars focus on efforts to protect and interpret the constitutional provision. Thus, the discussion on the retroactivity of tax legislation is limited to the effort to ascertain whether a tax statute is in violation of the Constitution.

In particular, Article 78 paragraph 2[181] of the Constitution establishes limited retroactivity with regard to tax charges (and not tax allowances) in the following sense: On the one hand, it allows the retroactive imposition of taxes if they refer to the fiscal year preceding the imposition of the tax whereas, on the other hand, it deprives the legislature of the right to impose a retroactive tax before the aforementioned time i.e. before the fiscal year preceding the imposition of the tax.

The enactment of the said article is mainly the result of the coalescence of two principles: Firstly, the principle of legal certainty and secondly, the principle of democracy. Therefore, on the one hand, the constitutional provision aims to establish a secure economic environment that would allow everyone to know in advance what taxes would be levied on their economic activities[182]. On the other hand, though, it seeks to allow any newly elected government to apply its economic policy immediately after its election[183]. Apart from the above, the constitutional provision also allows any given government to impose limitedly retroactive taxes in the case of extreme circumstances.

It must be noted that the legislature and the executive have generally been observant of Article 78 paragraph 2 of the Constitution and in the rare exceptions that this was not the case, case law has held the majority of relevant provisions to be unconstitutional. Finally, as already stated above, the prevailing opinion is that Article 78 paragraph 2 of the Constitu-

181. 'A tax or any other financial charge may not be imposed by a retroactive statute effective prior to the fiscal year preceding the imposition of the tax.'

182. Before the constitutional reform of 1975 this was a demand raised by politicians, university professors, lawyers and economists who were disappointed by court decisions issued prior to 1975 that had declared retroactive tax legislation to be permissible. The fifth revisional parliament answered their call and unanimously accepted that retroactivity of tax laws should be prohibited. Therefore, the discussion held during the first phase of the parliamentary debate was short and focused primarily on fairness arguments, such as reliance considerations, accepting them as obvious. Nevertheless, during the second parliamentary debate, held in plenary session, the initial decision was overturned and limited retroactivity was established.

183. If limited retroactivity had not been permitted then newly elected governments would not be able to apply their political platform from the commencement of their term. For example, if a government was elected by the people in June, even if income tax rates were changed immediately after election, the incomes burdened by the new tax regime would be those of the future, i.e. in the best-case scenario the incomes created in the period from June to December. The tax revenues, though, deriving from this income would be collected near the end of the next year. Therefore, in the meantime the taxes would be collected according to the tax regime, implemented by the previous government. Therefore, it would be difficult or almost impossible for any given government to practice its own economic policy, as fiscal policy would not be able to be applied for a considerable period of time. This fact would lead to the inability of newly elected governments to exercise an overall economic policy, when at the same time they would have to apply inconsistent policy segments. Thus, it can be concluded that the will of the people would not be observed and respected in an immediate manner.

tion expresses the public sense of justice and therefore no significantly different opinions concerning the retroactivity of tax statutes have arisen[184].

3.9.7.2. **Debate on law and economics view on transitional law**

In Greece the view expressed by the economic analysis of law and generally by law and economics on transitional tax law has not given rise to discussions in the scientific literature. Moreover, it is not a view invoked by politicians and finally it has not been reviewed by case law. The aforementioned is the result of two main factors:

a. The fact that the respective constitutional provision expresses the public sense of justice and therefore the legal academic world does not feel the need to investigate the possibility of its reform (as described in more detail in 3.8.6.1.)and
b. The poor influence of the law and economics approach in Greece[185].

It must be emphasized that due to the aforementioned reasons the law and economics view on transitional law has not been introduced at all in Greece, let alone promote a debate.

---

184. A different approach worth mentioning is expressed by Professors Anastopoulos and Fortsakis (I.D. Anastopoulos and Th. P. Fortsakis, *Forologiko Dikeo* (Tax Law), (Athens-Komotini: Ant. Sakkoulas Publications, 2002, at p. 122) in reference to the principle of democracy. In this textbook the writers refer to the principle of democracy, not in order to justify the allowance of retroactivity (as done by the members of parliament), but its prohibition. In particular, they claim that, if retroactive taxation were to be permitted, then the democratic legitimization of the present legislature would substitute the respective legitimization of the previous legislature.

185. In 1999 Assistant Professor Aristides N. Hatzis stated the following: '*Economic analysis of law (EAL) is at a nascent level in Greece. It is virtually unknown to the great majority of lawyers and economists (including academics), who think of it as something as exotic and elusive as sociology of law…*' Ten years later, although there has been improvement, the situation is not all that different. Despite the fact that law and economics is an elective course in the Faculties of Law of the Kapodestrian University of Athens and of the Aristotle University of Thessaloniki and is frequently referred to in textbooks of various fields of law, most Greek jurists are expected not to have knowledge of the content of the term, while it may be the case that they have not heard of it at all. It should be noted, however, that the Greek Association of Law and Economics was established in 2002. Furthermore, relevant articles, even though limited in number and in attention received, have discussed matters from various fields of the legal science, such as commercial law, labour law, family law, law of obligations, property law, criminal law, etc.
In particular, there are only limited articles with regard to the economic analysis of tax law, which are mainly introductory in nature. At the same time, it should be noted that transitional tax law has not been the object of research and therefore, the opinions voiced by Professors Graetz, Kaplow and the other researchers in the area of the economic analysis of tax law have not been presented in Greece.

3.10.
Hungary

Daniel Deak

3.10.1. Introduction

Positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice.'[1]

Retroactive actions can take place in the various segments of business life. Apparently, legislation or the judiciary repeal of statutes can be retroactive (it is assumed that judicial law-making is not possible). Moreover, companies may be induced to reopen their final accounts retroactively both for financial accounting and income tax purposes. In tax law, self-revision of the past tax liability can also occur. For legal purposes, the facts of time, and changes in time, matter. Both the legislator and courts refrain from interfering with completed legal relationships unless there is good reason to do so. The statute of limitations[2] constitutes quite a serious burden for the actions of the state organs, as clearly became evident in Hungary in as early as the nineties where the formulation of political will of the new democracy collided with the constraints of the rule of law.

The evaluation of retroactive (or retrospective) legislation is a matter of providing transitional justice, or rather of seeking to manage transitional times by means of law (i.e., treating an inter-temporal conflict of laws). The two extremes between which a solution must be found are legality and legitimacy. The first option is emphasized by Kelsen or Radbruch. According to them, the idea of substantive justice is to be subsumed under the scope of positive law. It is suggested that not only material justice or legitimacy, but also equality are values that cannot be considered to be indispensable within the borders of a legal order. Arguably, positive law must not be subject to outward ideas. It must be a closed system driven by the logic of consistency only. If this is the case, a legal system is apt to substitute lawfulness for any kind of justice.[3]

Retroactive or retrospective legislation can be forgiven for good reasons. After all, the supremacy of the parliament of a country to make law may prevail if necessary over the legal certainty maxim. Legislating substantive rights may thus take priority over the formal

---

1. Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law (1946)', *Oxford J Legal Studies* (2006), Vol. 26, No. 1, at p. 7; Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht', *Süddeutsche Juristenzeitung*, No. 1, 1946, at p. 107.
2. It is a statute prescribing a period of limitation for the bringing of certain kinds of legal action (taken from the New Oxford American Dictionary, Apple Macintosh).
3. According to Kelsen, the enforcement of law can be guaranteed by the systematic application of the promise of organized coercion, the eventual technique of law. The technique of social control means with Kelsen in turn the forms in which conformity to legal norms can be achieved. Hans Kelsen, 'The law as a specific social technique', *University of Chicago Law Review* (1941-42), Vol. 9, at p. 79.

concept of the rule of law principle.[4] Indeterminate legal concepts may challenge the operability of the legal order, however. Thus, the rule of law may arguably set a standard that cannot be superseded at any instance by any public body (state organ), bound to effective laws, even if enjoying full legitimacy.

Lawfulness certainly prevails over justice in the field of criminal law. In the area of tax law, however, legal certainty may be subject from time to time to the considerations of equity or efficiency. This does not mean that the certainty maxim drafted by Adam Smith[5] would not be the norm, in comparison to which deviations like retroactivity can take place only exceptionally.

3.10.2. **On terminology**

3.10.2.1. **In general**

In many jurisdictions, there are no separate terms to denominate legislation which is retroactive or retrospective (e.g., 'lois rétroactive', 'effetto retroattivo', 'обратная сила закона'). In German legal discourse, the case of retroactive or retrospective legislation is better defined to the extent that distinction can be made between 'echte und unechte Rückwirkung'. Since this report is prepared in English, I shall explicitly distinguish between the two terms. Following the Latin roots of 'retroagere' (drive back) and 'retrospicere' (look back), I shall use the term 'retroactive' for 'ex post facto' legislation. Where a law enters into force with a retroactive effect, I mean that it is applicable to events that started and ended in the past, that is, before the date the law entered into force. Subsequently stipulating rights and obligations that apply to past relationships, a statute is thus introduced as if it had existed before the existence of these relationships. In other words, changes may be made effective in past years, deeming the law to have been that which it was not.[6] A statute, entering into force retrospectively, is applicable to existing relationships, which have started in the past, but which have not yet completed at the time when the new law enters into force. Retrospective legislation suggests changes in law prospectively. This is because the new law will be applicable to events that continue to exist.

In the first case (retroactivity), one can take a look at events from the perspective of a tense of 'praeteritum imperfectum', in the second case (prospective legislation) from the perspective of a tense of 'praesens perfectum'. In other words, retroactive legislation alters the past legal consequences of past actions while retrospective legislation changes the future legal consequences of past actions. Admittedly, the borderline between retroactive and retrospective legislation is elusive in many cases. This is because the actions that are affected by new laws can hardly be distinguished conceptually as to whether the events that are addressed by a new statute belong to the past or they continue to exist in certain ways in

4. Geoffrey T. Loomer, 'Taxing out of time: parliamentary supremacy and retroactive tax legislation', *British Tax Review*, 2006, No. 1, at p. 84.
5. An Inquiry in the Nature and Causes of the Wealth of Nations, in: R.R. Salter, J.L.B. Kerr and A. Easson, *Cases and Materials on Revenue Law* (London: Sweet and Maxwell, 1990), at p. 1.
6. Loomer, *supra* note 4, at p. 64.

the future as well.[7] In the case of retrospective legislation, vested rights are to be respected by introducing grandfathering provisions (or phasing out rules in respect of diminishing relief opportunities and phasing in rules in respect of newly introduced liabilities). Strictly speaking, a statute enters into force retrospectively if it has immediate effect without grandfathering existing rights.

Quite confusingly, retroactivity is usually called in the British judiciary practice retrospective, and a retrospective law is called as quasi-retrospective.[8] Tax legislation may prefer different approaches, depending on a particular case. Retroactive legislation means in countries like the Netherlands 'formal retroactivity', retrospective legislation suggests in turn 'material retroactivity'.

3.10.2.2. **Legal discourse**

In Hungarian legal language, no distinction can be made between retroactive and retrospective legislation. The term 'visszaható' means both retroactive and retrospective. A clear distinction is still made in fact between retroactive and retrospective legislation.

In Hungary, retrospective legislation occurs frequently in the area of administrative tax law. From year to year, the new provisions of administrative tax law are applicable even to pending tax matters, provided, however, that changes in the law do not take place to the detriment of taxpayers.[9] Retrospective provisions may also concern substantive tax law, but not frequently. In most of such cases, the new law is complemented with grandfathering rights. Thus, the new law usually introduces transitional measures in order to protect vested rights. Retroactive legislation is against the Constitution of the Republic of Hungary, as has been confirmed by the Constitutional Court several times. Exceptions to this occur very rarely, and in favour of citizens only.

3.10.2.3. **Statutes applying to a previous year (actual retroactivity) and statutes applying as from the beginning of the current year (de facto retroactivity)**

It can happen in Hungary that tax law provisions are changed retroactively in the sense that during the fiscal year changes are introduced even concerning existing legal relations with a retroactive effect to the beginning of the fiscal year. If such changes are in favour of taxpayers, they can enter into force. If changes imply in any respect a new burden for taxpayers, they cannot be introduced. The distinction between the cases where the new provisions which entered into force during the fiscal year apply to the previous fiscal year or they apply as from the beginning of the current year is nevertheless of no relevance.

In Hungary the argument cannot be accepted that the problem of retroactive legislation would allegedly not arise due to the fact that the liability to pay tax would arise at the

---

7. It may be difficult, in particular in practice, to clearly clarify the connection between the past and present tenses for the purposes of identifying the legal effect of particular events. The difference between them can be described as a matter of degree, rather than as a matter of categorical distinction. This does not mean that there would be no reason to maintain distinction – as a binary issue – between retroactive and retrospective effects – in theory at least. No definitional distinction can be accepted between primary and secondary retroactivity (i.e., between retroactive and retrospective legislation). Jill E. Fisch, 'Retroactivity and legal change: an equilibrium approach', *Harvard Law Review* (1997), Vol. 110, at p. 1069. The illusive nature of a precise definition of the problem of 'ex post facto' legislation converts the analysis from a binary into a quantitative issue. Rather than asking whether retroactivity is appropriate, we should ask what degree of retroactivity impact is appropriate. See pp. 1072-1073.
8. Attorney General v Vernazza [1960] A.C. 965 (HL), Wilson v First County Trust Ltd (No.2) [2003] UKHL 40; [2004] 1 A.C. 816 (HL), Catherine S. Bobbett, 'Retroactive or retrospective? A note on terminology', *British Tax Review*, 2006, No. 1, at p. 16.
9. Section 182 (1) of the Act XCII of 2003 on Taxation Order, as amended.

end of the fiscal year only, following the date when the new rules entered into force at the start of this year. Notably, the liability to pay income tax is of a substantive nature and arises from the legal relationship from which taxable income can be earned. Once the taxpayer enters into such a relationship, the liability arises to pay and administer income tax (by way of filing tax returns, notifying the tax authorities of certain events, etc.). It is another question that the taxpayer is due to pay (and administer) income tax following the year only in which income has been earned by way of filing the annual tax return. Moreover, income tax liability arises 'in abstracto' when the taxpayer enters into a legal relationship which makes it possible for the taxpayer to earn income. The date when taxable income is deemed to be derived may, however, be different from the date when the taxpayer enters into such a legal relationship.

For instance, under employee stock offering programmes eligible employees are entitled to subscribe to shares, which are normally locked up for a certain time period. They are subject to tax liability from the very date they entered the programme, be it enrolling in it or subscribing to shares. The date when taxable income is, however, deemed for tax law purposes to be earned is at the later date only when an employee is entitled for any reason to dispose of the shares subscribed or to otherwise benefit directly or indirectly from the shares deposited during the lock-up period. It is a third date when the employee who has earned taxable income has to file a tax return and pay tax accordingly.[10]

3.10.2.4. **Interpretative statutes**

The Hungarian law is quite strict in prohibiting both retroactive and retrospective legislation. Retrospective legislation can be forgiven in a number of cases, however. An example for this is a judgment of the Constitutional Court, approving an exception to the prohibition of retrospective legislation on the grounds that the new law, introducing an anti-avoidance-principle, was of an interpretative nature.[11] The Constitutional Court discussed whether the principle that contrived transactions had to be disregarded for tax purposes – introduced in line with the adoption of the then effective Act on tax administration, which entered into force on 1 January 1991 – could be applied to transactions which were carried out before the date of entry into force of this Act. Arguments can be raised in favour of the application of this principle to the cases started not only after, but also before the effective date to the extent that the law, now embodying this principle, did not create individual obligations on the taxpayers involved in current matters. The only thing that has allegedly changed is that the same tax law must now be applied with more consistency. Even if the problem of retrospective legislation could be raised, the Constitutional Court treated the anti-avoidance principle under discussion as a matter of interpretative law and, as such, did not consider that it would fall within the ambit of the prohibition of retrospective legislation.

The Constitutional Court is right, indeed, in arguing that the introduction of such a principle does not place on taxpayers new substantive law obligations. It is doubtful, however, whether taxpayers will be protected against the change in law with a retroactive effect

10. For example, the underlying tax liability can occur on 1 July 2009 when an employee enrols in a programme and subscribes to shares during a period of subscription, which is to follow enrolment, but which may not be longer than a couple of weeks. Their shares will be freed no earlier than on 1 July 2012. This is the date when the employee is obliged to recognize that taxable income has been derived, even if the employee decides to sell his or her shares at a later date, let us say, on 1 November 2012. The date of 1 July is the first day the employee can dispose of the shares subscribed, irrespective of the fact if the employee exercised this right or not. The employee will then be obliged to file an income tax return for the income earned during the fiscal year of 2012 no later than on 31 May 2013. Liabilities may still occur already in 2012 to arrange for advance income tax.
11. 724/B/1994. AB, No. 2/IV, Para. II.4.

in the sense that the introduction of new procedural rules may also lead to laying new obligations on taxpayers. Furthermore, it is doubtful whether the provisions on an anti-avoidance principle can really be seen as those of an interpretative nature.

3.10.2.5. **Validation statutes**

There is no 'validation statute' in Hungary, which would be designed to overrule a judicial decision and validate the existing legal practice by introducing new legal rules with a retroactive effect, in order to prevent taxpayers from effectuating tax avoidance. No example can be given from the Hungarian practice for the problem (or for a similar problem) raised before the European Court of Human Rights ('ECtHR') in the case of the *National & Provincial Building Society and others v. the United Kingdom*.[12] An interpretative statute cannot be considered in Hungary as identical to a validation statute.

3.10.2.6. **Effective date preceding the date of entry into force**

It is quite normal in Hungary that the effective date of particular provisions would follow the date when an Act enters into force. It is categorically prohibited that the effective date of provisions would precede the date when the new Act enters into force. It is not prohibited that the new law is introduced with an immediate effect (the effective date and the date of entry into force are the same in this case). However, it is a matter of discussion (or of the discretion of the Constitutional Court, which must decide from case to case) if those who are addressed by the new law have enough time to prepare themselves for the application of the new law. In that respect, it is not the date of entry into force, but that of the promulgation of the new law that matters, i.e. this is the basis for comparison.

3.10.2.7. **Retrospective legislation (material retroactivity)**

Retrospective legislation is not acceptable in Hungary either in the tax law area, or anywhere else. Exceptions to this rule are rare. Section 226 (2) of the Civil Code (Act IV of 1959, as amended) is noteworthy, as it provides for that the contents of the contracts, concluded before the date when the new law entered into force, cannot be changed by statutory law, but exceptionally. This means retrospective legislation, affecting the transactions started earlier. However, the new law is applicable prospectively. This exceptional power of legislation can be explained by analogy with the principle of the 'clausula rebus sic stantibus'.

The retrospective nature of legislation can be identified in different cases. These cases have in common, however, that they have not yet been fully completed. For instance, the assets purchased may have appreciated. As a result, capital gains will be accrued. The new tax law will apply to the taxation of capital gains, even if they accrued earlier, in the instance that capital gains are deemed to be derived at the time only when the assets are disposed of at a gain. One can argue that the date when the new law entered into force was preceded by the date when the acquisition of the assets took place. However, one must also take into consideration that the new law entered into force before the date when the disposal of the same assets would have been effectuated.

The question can be raised if this case is conceptually different from a loan contract, which has not yet expired, and the taxation of interest changes in the meantime. This is a

12. The UK legislator had to overrule with retroactive legal rules the judgment made in the case of *Woolwich 1* where the taxpayer liberated itself from the liability to pay tax on interest in a gap period due to the fact that the 1986 Regulations were void on technical grounds. Application No. 117/1996/736/933-935, judgment at Strasbourg on 23 October 1997.

case arguably different from the first one because the single transaction, subject to tax, has not yet been completed at the time when the law changed. In fact, for tax purposes, no distinction can be made between the two cases, however. Even in the first case, the transactions of acquisition and disposal must be linked to each other in order to arrive at the economic content, according to which the taxable event can be interpreted. In both cases, the tax legislation is retrospective. Tax laws can change in Hungary, although with grandfathering (as mentioned).

3.10.2.8. **Statutes having an immediate effect in the areas of substantive and procedural tax law**

In the Hungarian practice, a distinction is to be made between substantive and procedural law where legal rules are introduced with an immediate effect. Substantive tax law rules are usually introduced with grandfathering. Administrative tax law rules with an immediate effect can be applied to pending cases (resulting in retrospective legislation), providing, however, that changes do not take place to the detriment of the taxpayer, as mentioned. Administrative tax law provisions can be found both in the Taxation Order Act and in independent laws on particular taxes (laws on individual income tax, corporate tax, VAT, excise duties, etc.). The Taxation Order Act contains the basic principles that are guiding for the application of tax law in general (prohibition of the abuse of law, legal certainty, non-discrimination, equity, etc.). They can hardly be considered procedural law provisions. In the rest of the Taxation Order Act, the legal provisions on tax administration can be found. They entail the legal provisions on the exercise by the tax authorities of jurisdiction in tax matters (rules on gathering tax information, tax assessment, the payment of taxes, etc.) and those on the operation of the tax authorities. The provisions belonging to the former group can be considered procedural tax provisions, properly speaking.

In a legal case brought before the Constitutional Court,[13] it was discussed that the law on duties was amended from 1990 to 1991, resulting in abolishing a number of relief opportunities as from 1 January 1991. The Constitutional Court concluded that the infringement of Section 12 (2) of the Act XI of 1987 on legislation (as amended) on the prohibition of retroactive legislation could be identified where the new law was applicable to any cases already filed for assessment with the Duties Office, even if the liability to pay duty could have been developed before, i.e., at the date when the taxable contract was concluded. Arguably, the taxable transaction could have been completed during the fiscal year of 1990, before the time the new law entered into force. This way, the new law created the liability to pay duty relating to a transaction made in the past, that is, retroactively. This is an inexcusable infringement of the legal certainty principle (Section 3.10.2).

The Hungarian legislator assumed at that time that the legal rules on the liability to pay duties on property transfer and on procedures instituted before the authorities of public administration and the courts are of procedural nature as a whole. Not making a distinction between the substantive and procedural aspects of the liability to pay duties, the legislator neglected the fact that the liability of payment could be developed at the time when the contract was concluded, preceding the event when the complete contract was filed for assessment with the Duties Office, which then imposed the duty payable by taking a formal decision. This confusion could not occur after the judgment of the Constitutional Court.

A similar problem occurred at the time of Hungary's EU accession (on 1 May 2004) when the EC Assistance Directive and the EC Tax Collection Directives were introduced, and were promptly applied, even to the matters not yet finished until the time of accession. Although on the same basis of substantive tax law, the Hungarian taxpayers could still

13. 7/1992 (30.I.) AB.

encounter a new situation where the liability to pay taxes is enforced on a new procedural law basis. Such a situation is in fact more burdensome for taxpayers. It is a question only if this change in the taxpayer's burden can be recognized for legal purposes. Following the idea that the protection of the taxpayer rights must not be confined to that of substantive law rights, this question must be answered in the affirmative, given that, upon the protection of the taxpayer rights, procedural rights cannot always be separated from substantive law rights. As a consequence, one can argue that the retrospective effect of new procedural law rules can be considered in breach of the constitutional principle of the rule of law.

3.10.3. **Ex ante evaluation of retroactivity**

3.10.3.1. **Legal basis for retroactivity**

In Hungary, there is no explicit prohibition in the Constitution or in anywhere else in the legal system on retrospective or retroactive legislation. From the principle of the rule of law as enshrined in Section 2 (1) of the Act XX of 1949 on the Constitution of the Republic of Hungary, as amended, the Constitutional Court has developed, however, that retrospective legislation is not possible, but exceptionally, and with regard to the protection of vested rights, and retroactive legislation is prohibited as such (with very small exceptions, and only if the new law is in favour of citizens). This restrictive approach can be explained by the historical reason that, upon the transition into the new democracy, the political changes, even if revolutionary, could take place strictly within the limits of legal continuity. This historical background explains the sensibility of the public authorities to retrospective or retroactive legislation, which is considered the infringement of not only the rule of law, but the social compact, according to which radical political changes took place peacefully, and the Republic of Hungary is in full the legal successor of the People's Republic of Hungary existing before 23 October 1989. (This is the main reason, for example, why Hungary in 1990 did not renegotiate with banks the huge public debt assumed by the old government.)

3.10.3.2. **Transition policy**

The government has not released a transition policy paper in Hungary. However, the Constitutional Court developed a subtle policy on the possibility of retrospective legislation with particular regard to the protection of vested rights as well as on retroactivity. The first time, the Constitutional Court had to face the problem of retroactivity in the criminal law area in 1991 when it prevented the parliament from changing the criminal law rules on the statute of limitations in respect of politically motivated crimes perpetrated during the revolution and civil war of 1956 with a view to prosecuting these crimes. The second time, the Constitutional Court had the opportunity to deal with the problem or retrospective legislation in 1995 when public benefits and allowances were widely reduced through a reform package due to the overall budgetary constraints. The Constitutional Court developed its stance on the conditions under which vested rights must be protected.

As a consequence of the constitutional practice, the tax legislator is also careful. Retroactive tax legislation does not occur (with exceptions to the very few cases where changes in law are in favour of taxpayers). The legal rules introduced from year to year in the area of tax administration result in retrospective legislation, applicable to pending cases. They must not be applied to the detriment of taxpayers, however (as discussed). Retrospective tax legislation usually takes place, but in respect of major issues always with grandfathering. As a consequence of all the more irregularities as recently experienced in the operation of the national government, tax legislation has been very unstable, meaning that tax laws may change even within one single fiscal year.

3.10.4. Use of retroactivity in legislative practice

3.10.4.1. 'Legislating by press'

The instrument of 'legislation by press release' does not exist in Hungary. The Constitutional Court is very conservative, sticking to the date of promulgation, in respect of which legislation must not have retroactive effect. It can even happen that the Constitutional Court is not satisfied if a new law is promulgated and published in the official gazette. It is also required that a copy of the gazette with the new law should be available for those who are addressed by the new law, including both the public authorities and citizens.

3.10.4.2. Pending substantive tax law cases excluded form retroactive legislation

Pending cases cannot be affected in any way by retroactive legislation. As mentioned, new legal rules on tax administration can apply retrospectively, with the proviso, however, that the new law may not negatively affect taxpayers. The Constitutional Court has the power to repeal a legal rule considered to be unconstitutional retroactively, and may provide that the repealed law cannot apply to a pending case. Repeal by judiciary means of legal rules retroactively is, of course, a different matter from adopting a new legal rule with a retroactive effect.

3.10.4.3. Grant of retroactive effect to tax statutes that are favourable for taxpayers

It is not precluded in Hungary that in very exceptional cases the legislator grants retroactive effect to tax statutes that are favourable for taxpayers. It can even happen that amnesty programmes are introduced, but very rarely. Such amnesty programmes are still strongly criticized because they hurt the principles of the ability to pay and of legal certainty, and they have not been associated with the programme of combating tax avoidance and tax evasion.[14]

3.10.5. Ex post evaluation of retroactivity

3.10.5.1. Testing by courts of the retroactivity of a tax statute for compatibility with the Constitution

The Hungarian courts are not allowed to test Acts or legal regulations for compatibility with the Constitution. As a consequence, the retroactivity of a tax statute cannot be tested either. The Supreme Court does not have any jurisdiction over constitutional matters. The courts are also bound to the effective legal rules as they are. The only possibility for a court is to apply for a legality review with the Constitutional Court where the court seized of a specific case, while applying legal rules, finds that the conformity of these rules with the constitutional order is doubtful. The Constitutional Court has the exceptional opportunity to repeal the legal rule found to be unconstitutional with a retroactive effect. This rule cannot then be applied to the specific case either.

Hence, constitutional review is within the exclusive competence of the Constitutional Court. Normal courts may file an application only concerning the compatibility of the laws applicable in a specific case to the Constitutional Court. It is for the latter to decide on compatibility. An application to the Constitutional Court for constitutional review can be made

14. D. Deák, 'Hungary's half-way tax amnesty', *Tax Notes International* (February 16, 2009), Vol. 53, No. 7, at pp. 603-607.

by ordinary courts in terms of a court resolution (a decree). Litigating parties may, of course, propose that the court seized in the specific legal case should file the issue to the Constitutional Court. The standard for testing by courts of retroactivity is the principle of legal certainty.[15]

3.10.5.2. Testing by courts of the retroactivity of a tax statute against Article 1 of the First Protocol ECHR

The problem of the retroactivity of Hungarian legislation has not yet been brought before the ECJ or the ECtHR. In principle, it is not precluded that Hungarian courts refer to Article 1 of the First Protocol ECHR[16] in the context of retroactivity where they approach the Constitutional Court for review.

3.10.6. Retroactivity of case law

3.10.6.1. Abandonment by the Supreme Court of the existing case law and formulation by the Court of a new general rule

In Hungary judgments do not have an 'erga omnes' effect. While the study of the relevant legal cases has been all the more important in the recent two decades, there are no precedents in Hungary. Where differences occur for any reason between judgments made in comparable cases, the Supreme Court must pass resolutions on the uniform applicability of law. The aim of such resolutions is solely to solve the possible conflicts developed between the past judgments. The Supreme Court is not allowed to abandon existing case law and formulate a new general rule.

The Constitutional Court has the power to repeal Acts or legal regulations if they are found to be unconstitutional. Normally, the Constitutional Court will repeal them prospectively. If they are repealed with retrospective effect, this fact is always precisely explained by the judgment. The Constitutional Court is not authorized to formulate new principles of law or adopt transitional measures. It has the power, however, to decide that the legal norms repealed with a retroactive effect should not affect certain legal relationships that have been completed. Apparently, the Constitutional Court refrains from interfering with the past without sufficient reason.

Legal cases cannot be reopened in Hungarian law as a result of new judgments. It is a possibility to get remedy only where it turns out that the legal rules applied in the case under discussion have been declared subsequently to be unconstitutional. Due to the principle of 'res iudicata', final judgments are not subject to review, but within the strict limits of a petition of legal review that can be filed with the Supreme Court within 60 days from the time the judgment has been final, and in certain cases only.

Where the Constitutional Court repeals certain legal provisions with a retroactive effect and excludes the applicability of these provisions to a case that has been decided by a final judgment, the Supreme Court asks the petitioner who challenged the applicability of the provisions to the case under discussion to decide whether to apply for novation of litigation within 30 days (Section 361 of the Act III of 1952 on Civil Procedure, as amended). Furthermore, final judgments may in principle be changed as a result of the intervention of the ECJ that may find that the national law provisions, on the basis of which the case was

15. How the Constitutional Court interprets it is discussed in detail in the paper at p. 10 [see 1/1992. (5.III.) AB, Paras III. 1, 3,. 4, 5, IV. 1].
16. European Convention on Human Rights, signed at Rome on 4 November 1950; Protocol No. 1, signed at Paris on 20 March 1952.

decided, are not consistent with Community law (see, e.g., Kühne and Heitz, Lucchini, Kempter).

3.10.7. Views in the literature

3.10.7.1. Background study on the Hungarian Constitutional Court's practice on retrospective and retroactive legislation with particular regard to tax cases

a. A history of the restrictive approach to retroactive legislation

The Constitutional Court already faced the problem of retroactive legislation early in the nineties. Legal certainty was one of the crucial issues at the time when at stake was how successful the transition from state socialism and a centrally managed economy to a parliamentary democracy and a market economy would be. The Constitutional Court contended that even the utmost radical political changes had to take place strictly within the framework of the rule of law. Changes in the legal system were therefore established on the continuity principle: the democratically elected new parliament and the government responsible for this parliament were bound to the old legal rules, which were in effect at the time of taking over power. To date, the only possibility to change the effective legal rules has been if changes are in accordance with the constitutional order and the due procedures of legislation.

There was a landmark decision in 1992 when the Constitutional Court prevented the parliament from adopting a law which was designed to change the criminal law rules on the statute of limitations in respect of the political crimes perpetrated during the 1956 revolution that had not been persecuted before 1990 for political reasons (as mentioned).[17] The idea was that these crimes must not remain unpunished because the new republic must be freed from the psychological and moral burden of the crimes left unpunished. It was still difficult to digest the lesson that political ideas could not be developed unless they were consistent with the effective legal order. In particular, it was important to understand that even the – possibly invisible – law had to be respected on how to change laws.

Obviously, the questions of the statute of limitations and retroactive legislation must not be discussed in the same way in criminal and tax law. However, this judgment of the Constitutional Court goes beyond the scope of criminal law in its significance. It has laid down the foundations, which have been effective to date, of the possible treatment of retroactive and retrospective legislation in general. One cannot understand except from this judgment of the Constitutional Court why the Hungarian standpoint on retroactive legislation has been much more restrictive than in old democracies.

According to the Constitutional Court, the term the 'state of law' (the rule of law) suggests a state of the art and a project simultaneously. The rule of law can be accomplished not only because the state organs operate regularly, but also due to the fact that the whole society is permeated by the conceptual order of constitution (Section III.1). The point of the changes of the political system of 1989 is that the radical political changes are accompanied from a legal point of view by continuity. As a consequence, no distinction may be made between the two layers of the legal order, depending on whether laws have been adopted before or after the political changes (Section III.3). The two layers of the law are of the same value, validity and nature, the Constitutional Court contends.

The legal certainty standard requires that the legal relationships as completed must not be affected unless there are exceptional circumstances that produce proof to the contrary. Legal facts become independent of the underlying legal norms (Section III.4). The state must thus not interfere with the accomplished legal facts, but exceptionally. Justice

17. 1/1992 (5.III.) AB.

that can be spelled out in a judgment, being of a partial and subjective nature, should be superseded by the legal certainty standard, based on objective criteria and on pure formalities (Section III.5). Legal certainty requires that legal provisions be clear, predictable and transparent. It directly follows from these requirements – the Constitutional Court contends – that the application of retroactive legislation or legislation per analogy is prohibited (Section IV.1).

The constitutional liberties represent the very foundations of the state of law (Rechtsstaat). It follows therefrom that the public power is not without limitation. State interference must take place in accordance with the principle of subsidiarity. Therefore, state interference cannot be considered constitutional unless it is indispensable, necessary and proportional with the envisaged aims (Section IV.2).

This standpoint may also serve as guidance for the prescription of tax liability. It can be required from a constitutional point of view that the private law-driven schemes must not be affected by tax legislation as long as the abuse of law cannot be ascertained. Even in respect of tax legislation private law takes priority over public law. This entails that public bodies cannot act unless they are explicitly authorized to do so. There is thus no universal authority that would be granted to the public authorities. Where the authorization of the state organs is incomplete or obsolete, gaps left by public law must be filled by the principles and consideration of private law.

The Constitutional Court holds that, according to the rule of law, it is not guaranteed that a time period will not elapseafter which crimes can no longer be prosecuted. It is guaranteed, however, that the rules on the statute of limitations are unchanged. Administrative measures are not apt for interrupting or suspending the period of the statute of limitations (Section V.2-3). By force of the statute of limitations, the natural fact of the running of time is converted into legal facts, i.e., into facts with a legal effect (V.4). The state has a limited possibility to interfere with this process.

One can add that, quite similarly, it is difficult to change the conditions for the recovery of tax claims. Where tax amnesty is introduced, the enforceability of taxes is unexpectedly and radically reduced, and the tax claim developed in the past can be forgiven due to the new law introduced retroactively. This change is made in favour of taxpayers. However, it can be criticized because an amnesty project will change the allocation of the public burden, which inadvertently affects the taxpayers who cannot, or will not, benefit from the amnesty programme.

3.10.7.2. **Retrospective and retroactive legislation**

In an important case,[18] the Constitutional Court introduced a distinction between retrospective and retroactive legislation, holding that it was justified to interfere prospectively with the conditions of the preferential long-term housing loans granted by the state. These loans were determined with low interest rates before the political changes. It could be justified to adjust these interest rates to reflect the deterioration of the circumstances in the public budget. It could also be appreciated that the changes were accompanied with transitional measures, giving a possibility for debtors to opt out. The government made use of Section 226 (2) of the Civil Code (as discussed, it provides that the contents of the contracts which were concluded before the entry into force of a new law can exceptionally be changed by the new law). The Constitutional Court contended that in principle the state could not be prevented from unilaterally changing the conditions of contractual relationships, the components of which arose both from private and public law (Section IV.4).

18. 32/1991 (6.VI.) AB.

Under Section 12 (2) of the Act on Legislation, a legal rule must not determine any obligation, which had to be fulfilled before the date when the new rule was promulgated. The provisions on changing the interest conditions of preferential housing loans cannot be interpreted as if they had been introduced with a retroactive effect. The increase in the interest rate ensured the amendment of the conditions of the preferential loans for the future. This is true even if the new law induces changes that affect the conditions of the existing loan contracts. This amendment is thus not covered by Section 12 (2) of the Act on Legislation. The new law may still be affected by Section 12 (3) of the same Act. According to it, the date of entry into force must be determined in such a way that enough time remain for making preparations for the application of the new law. In the specific case, the legislator could not be blamed even for the infringement of the provisions of Section 12 (3) because the new law was accompanied by the introduction of transitional rules (Section V.1.3). The Constitutional Court did not find a link between the changes in the conditions of preferential public loans and the ability-to-pay principle. There was a dissenting opinion, however, according to which the changes made in the conditions of subsidies are inseparably connected to the liability to pay taxes.

Another early case can also be highlighted.[19] It can be seen from the files that the transfer of immovable property for no consideration was made on 30 December 1989, the case was filed for assessment with the Duties Office on 3 January 1990, the new law on the property transfer duty was adopted and promulgated on 28 December 1989, but the official gazette with the new law on the liability to pay duty on the gratuitous transfer of property was distributed and delivered to subscribers only on 8 January 1990. The new law entered into force on 1 January 1990 with effect as from the same date.

The Constitutional Court concluded (Section II.2) that the legislator infringed both Paragraph 2 and Paragraph 3 of Section 12 of the Act on Legislation because

- the law, being inconsistent with Section 12 (2), created an obligation in connection with a transaction completed before the date when information of the new law was available for taxpayers (that is, before 8 January 1990); and
- the new law did not leave enough time for preparations that would have been necessary in compliance with Section 12 (3).

Interestingly, the new law had already been adopted by the parliament on 28 December 1989, before the date when the transaction was effectuated (on 30 December). Taxpayers might have had the opportunity to be informed of the new law as early as 28 December 1989. However, the Hungarian practice is strict enough to stick to the later date for comparison. Hence, those who are addressed by the new law should be granted the real opportunity to be informed of the new law, which could be ensured if the date of comparison is no earlier than at the date when the official gazette was delivered to its subscribers.

As discussed, the Constitutional Court did not object to the increase of the interest rates of the preferential housing loans for 1991. However, the problem of increasing the interest rates of the preferential housing loans was the subject of another case as well.[20] This time, the Constitutional Court did not approve that the new law was introduced with effect from 1 January 1991, although a copy of it was available for those who were addressed by the law on 14 January 1991 only when the official gazette with the new law was delivered to subscribers. This way, the new law created obligations with a retroactive effect. Accordingly, the Constitutional Court declared the provisions of the new law unconstitutional for a period from 1 January to 13 January 1991, but added that the act of repeal does not affect the legal relationships developed before the date when the resolution of the Constitutional Court was promulgated (30 April 1991). The Constitutional Court took into consideration

19. 34/1991 (15.VI.) AB.
20. 25/1992 (30.IV.) AB.

that the inapplicability of the new law for a short period of two weeks would lead to confusion, and it was not the intention of the Constitutional Court to cause problems for people having in legal relationship that have been already completed. In this judgment the Constitutional Court nevertheless reasoned as follows: it is not consistent with the principle of the rule of law that someone could be called into account for the infringement of a legal rule of which the affected person was not aware, and could not be aware of, because the new rule was not promulgated or because it was promulgated subsequently and introduced with a retroactive effect.

In another case,[21] there was a problem with a ministerial decree on customs tariffs because the new regulation entered into force on 11 February 1991 with effect on the same day, and it was promulgated no earlier than on the same day. The Constitutional Court had the opportunity to illuminate the meaning of Section 12 (3) of the Act on Legislation (Section II), holding that the effective date of the new rules must be determined with regard at least to the following:

- a copy of the official gazette with the new law must be available, and time must be allowed for those who are addressed by the new law to study it and get information from the authorities if necessary in connection with its application; and
- the authorities competent to apply the new law must also be given enough time to prepare themselves.

Exceptionally, it is not precluded that new legal rules will be promulgated on the date when they enter into force and become effective where the early publication would endanger the correct application of the new law (one can add that, for example, it may be the legislator's intention to preclude in this way the application of blatant tax planning schemes).

In a further case,[22] the Constitutional Court was expected to decide on the conformity with the constitutional order of the abolishment in 1995 of a number of child-care benefits. The abrupt introduction of the new law was condemned. The Constitutional Court concluded that the change under discussion in the conditions of social security allowances could not be challenged even if they concerned existing family relations. However, vested rights must be protected. To that end, a sufficient transitional period must be ensured to give enough time to those who are addressed by the new law to prepare themselves (Section 1).

Sometimes it can happen that the calculation of the (advance or final) tax liability is based on the income earned in the previous year. In one case,[23] the Constitutional Court made a scrutiny of the newly adopted law on the liability of a particular class of sole traders to pay social security contributions, based on the income earned in the previous year. The Constitutional Court has explained that this does not mean retroactive legislation if the new law provides for the conditions of the liability to pay contribution prospectively. Furthermore, it is matter of technique only whether or not to calculate the liability of payment, based on the previous year's earnings (Section II.1).

It cannot yet be precluded that the application of such a technique may result in the infringement of the taxpayer rights, which must be protected constitutionally. For instance, in the case of the *National & Provincial Building Society and others*, which was brought before the ECtHR,[24] the applicants raised among other things the objection to the UK law on the taxation of interest in a gap period that the prompt taxation of interest, based on the inter-

21. 28/1992 (30.IV.) AB.
22. 43/1995 (30.VI.) AB.
23. 54/1995 (15.IX.) AB.
24. Application No. 117/1996/736/933-935 by the National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v. the United Kingdom; judgment at Strasbourg on 23 October1997.

est income earned in the previous fiscal year, and its later correction, regularly led to granting taxpayers a loan involuntarily to the Treasury. In such circumstances, the introduction of taxation in a gap period may result in retroactive legislation. Where, however, the technique of the calculation of tax liability, which is based on previous year-earnings, is neutral, it must be insulated from the problem of retroactive legislation.

3.10.7.3. Failure to explore the lack of retrospective legislation due to the failure to discover the lack of real change in the law

Conflicts between the principle of the prohibition of retrospective or retroactive legislation and the protection of the public interest (or, in particular cases, the respect of the considerations of equity or efficiency) cannot be solved mechanically. Instead, inquiries must be made into the facts and circumstances as the case arises. Attention must be given, among other things, to the circumstances in which the new legal provisions have been adopted. It must be borne in mind that the rights vested not long before the entry into force of the new law requires particular protection.

In a case,[25] the Constitutional Court, making a scrutiny of the Act, which extended the obligation of obtaining from the police a permit for Flobert rifles retrospectively, did not consider the new law unconstitutional in general. The new Act interfered with the existing conditions of holding personal weapons, but it was introduced prospectively. The Constitutional Court still identified the problem that the new law was not simply applied to those who already possessed weapons, but also to those who were in the process of applying for a renewed permit. The Constitutional Court concluded that the legislator was not reasonable in extending the new law with a prompt effect even to those who were applying for a renewed permit. The new Act could be challenged because it did not secure a transitional period in which the persons concerned by the new law could have prepared themselves for the application of the new law (Section III.B.2.1).

Similarly, if companies have enjoyed corporate tax allowance relating to qualifying investment projects for a long period of time, they must not be considered to be harmed if the allowances will be reduced or withdrawn after a while. However, when taxpayers enter a privileged status just before the time the law has been changed, they may expect a kind of stability, and that the law should not be changed abruptly. It is another issue if tax holidays are granted for a specific period of time. In these cases vested rights certainly enjoy increased protection.

In one case,[26] the Constitutional Court repealed retrospective legislation which had changed the conditions of tax holidays prospectively, allegedly to the detriment of existing taxpayers. The new Act restricted the scope of existing tax holidays, but the effective liability to pay tax did not change because of the simultaneous reduction in corporate tax rates. The taxpayers argued that they were entitled to a tax allowance, calculable as a certain percentage of nominal corporate tax. This percentage was changed to their detriment. The government argued in turn that the taxpayers did not suffer any disadvantage because the tax liability was the same as a result of the general reduction in the corporate tax liability. As a consequence, no retrospective legislation could be ascertained. According to the Constitutional Court, however, the reduction by retrospective legislation in vested rights obtained for a specific period of time could not be upheld (Section II.7.1). As a consequence, the Constitutional Court repealed the law under dispute with a retroactive effect to the date of its entry into force.

25. 9/2007. (7.III.) AB.
26. 16/1996 (3.V.) AB.

Before 1995, corporate taxpayers could benefit under certain conditions from a 100% allowance of 36% corporate tax. After 1995 (and in 1996), they could benefit under similar conditions from 100% of 18% corporate tax. However, a 23% supplementary tax was levied on distribution as well. According to the interpretation of the new law by the Finance Ministry, the supplementary tax could be treated as a withholding tax on dividends that could be sheltered almost in full by a respective double tax convention. It could not yet be taken for granted that the supplementary tax could have been treated as a withholding tax on dividends,[27] although this question was not discussed by the Constitutional Court.

The Constitutional Court preferred a formalistic approach, which can be criticized.[28] Namely, it focused on the basic tax of 18% only, and discussed the change in the corporate tax burden without taking into account the interplay between the basic tax and the supplementary tax. In fact, the Constitutional Court failed to make a real assessment of the corporate tax burden changes from 1994 to 1995 as a whole. Had the Constitutional Court grasped the real case, it would have realized that no change took place in corporate tax burden in fact. Accordingly, if no change takes place, there is no room for ascertaining retrospective legislation either. There were dissenting opinions. Their point was that the majority opinion was not well-grounded because the Constitutional Court discussed the basic tax in isolation from the supplementary tax, misled by the petitioners who, being interested in raising the issue of the basic tax only, did not challenge the new legal provisions on the supplementary tax.

3.10.7.4. **Repeal of existing laws with retroactive effect**

Under Section 42 (1) of the Act XXXII of 1989 on the Constitutional Court, as amended, where the Constitutional Court repeals legal rules for any reason, those rules will be abolished with an 'ex nunc' effect, that is, as from the date when the resolution of the Constitutional Court is promulgated. They cannot thus be applied from that date on [Section 43 (1) of the Act on the Constitutional Court]. Under Section 43 (2), nullification by the Constitutional Court of legal rules does not affect either the legal relationships entered into before that date, or the rights and obligations arising from these relationships. Exceptionally, under Section 43 (4), the Constitutional Court is empowered to repeal a legal rule as from a fixed future date, or even with an effect of 'ex tunc'. The Constitutional Court may also decide under the same Section whether the legal provisions repealed (retroactively or prospectively) are applicable or not to a specific legal case referred to by petitioners before the Constitutional Court.

In one case,[29] it was proposed that the Constitutional Court be obliged as a rule to repeal the legal rules found to be unconstitutional with an 'ex tunc' effect. Arguably, once a legal rule is considered to be unconstitutional, it is invalid, and must be declared inapplicable with effect both retroactively and prospectively. The Constitutional Court did not agree with this proposition, holding that one must distinguish between the act of nullification and the fact of being null and void (invalid from the outset). The Constitutional Court, while examining the legal rules presented before it, does not take a stand on the question whether the legal rule, which is to be repealed, is invalid. It only decides on the non-applicability of the legal rule that has been found to be unconstitutional. Since the question of invalidity is

---

27. C-294/99 *Greek Amstel*, ECR 2001, p. I-6797, Paras 28-29, C-375/98 *Epson*, ECR 2000, p. I-4243. Para. 23, C-284/06 *Burda*, ECR 2008, p. I-4571, Para. 52. For comments, see: D. Deák, 'Supplementary corporate tax in Hungary: Confusion for foreign investors', *Tax Notes International* (December 4, 1995), Vol. 11, No. 23, at pp. 1480-1483.
28. D. Deák, 'Hungary's Constitutional Court invalidates new limits on investment incentives', *Tax Notes International* (July 8, 1996), Vol. 13, No. 2, at pp. 88-90.
29. 10/1992 (25.II.) AB, Para. II.3.

not affected, the Constitutional Court did not commit itself to decide on abolishing a legal rule, which is not consistent with the constitutional order with a retroactive effect. It can do that, but it is not obliged to do that.

The act by the Constitutional Court of nullification is of constitutive nature, that is, the act under discussion becomes inapplicable as a result of the specific decision of the Constitutional Court. Were it possible to ascertain the invalidity of the legal rules under discussion, the decision of the Constitutional Court would be of declarative nature only (only declaring what the law has been), meaning that the legal rule as challenged before the Constitutional Court would have been invalid from the outset irrespective of whether the Constitutional Court decided on it or not.

Similarly, the non-application of national law contrary to Community law does not mean that the national law provisions, which cannot be applied in a certain case, would be invalid. The ECJ held in Joined Cases C-10/97 to 22/97 IN.CO.GE. '90[30] that the obligation of a national court to disapply national legislation introducing a charge contrary to Community law must lead that court, in principle, to uphold claims for repayment of that charge. Such repayment must be ensured, however, in accordance with the provisions of its national law, on condition that those provisions are not less favourable than those governing similar domestic actions and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law. Any reclassification of the legal relationship established between the tax authorities of a Member State and certain companies in that State when a domestic charge subsequently found to be contrary to Community law was levied is therefore a matter of national law. The national law classification of the relationship between the taxpayers and the tax authorities was important in the said case in two instances because it depended on the classification of this relationship whether

– a court competent in fiscal or civil law matters had to take a decision; and
– the time limits relating to fiscal or civil law matters were applicable.

In another case,[31] the Constitutional Court found that the law, which provided for the effective date of 1 July 2001 on the changes in the conditions of the payment of professional training contribution, but which was promulgated on 5 July only, was unconstitutional due to retroactive legislation. However, the Constitutional Court did not repeal the Section of the new law which provided for the effective date 'ex post facto', taking into account that interference with complete legal relationships would lead to problems in the application of the law on professional training contribution (Section III.2).

The voluntary reduction in competence of the Constitutional Court is developed, seen from the point of view of dogmatics, suggesting distinction between the act of nullification and the fact of invalidity. Such a standpoint can be supported by considerations of legal policy as well. The Constitutional Court emphasizes the importance of the rule of law and legal certainty. It therefore carefully considers whether to interfere with the legal relationships that have been completed. Very convincing arguments should exist to justify that the legal rules found unconstitutional are abolished with a retroactive effect.

Another aspect of retroactivity can be revealed in connection with identifying the effect of the ECJ judgments. It is the established practice of the ECJ that the rules of Community law as interpreted by the ECJ must be applied by the national courts even to legal relationships entered into before the judgment ruling on the request for interpretation. It is only exceptionally that the ECJ may set limits on the effect of its judgments. Two criteria must be fulfilled before such a limitation can be imposed, namely that those persons who

30. ECR 1998, p. I-6307, Para. 29; See also: Joined Cases C-392/04 and C-422/04 i-21 *Germany, Arcor AG*, ECR 2006, p. I-8559, Para. 72.
31. 797/B/2001 AB.

are concerned should have acted in good faith and there should be a risk of serious difficulties.[32]

In Hungarian law, in addition to the normal legal actions brought before courts, citizens may put forward complaints of constitutional nature (Section 48 of the Act on the Constitutional Court). Such a complaint can be presented before the Constitutional Court and involves the alleged inconsistency with the Constitution of the legal rules applicable in a specific legal case. The petitioner may ask that the respective legal rules be declared unconstitutional with an effect retroactive to the case under dispute. Where such a claim is met by the Constitutional Court, the claim can be enforced before the normal court by means of a particular legal remedy as regulated by the Act on Civil Procedure (as discussed above).

National legal provisions can be declared by the ECJ not applicable with a retroactive effect to the case under discussion where it turns out subsequently that they are not consistent with Community law. As a result, the resolutions of the national authorities passed earlier are to be revoked and replaced by new ones that reflect the change in the legal basis.

In *Kühne & Heitz*, it was held that the principle of cooperation arising from Article 10 EC imposes on an administrative body an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the ECJ where

- under national law, it has the power to reopen that decision;
- the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;
- that judgment is, in the light of a decision given by the ECJ subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under the third Paragraph of Article 234 EC; and
- the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court.[33]

3.10.7.5. Relevance of the practice of the ECtHR and the ECJ on retroactive legislation to Hungarian law

An early case discussed before the ECtHR[34] offers a clear presentation of the legal basis for retroactive legislation, the components of which are as follows:

- Article 6 ECHR on fair trial cannot be applied directly in respect of retroactive legislation. This is because no subjective right can be found that would be associated with legislative amendments. A legislative amendment affecting the applicant's civil rights cannot be regarded as a determination of those rights.
- Similarly, Article 13 ECHR on effective legal remedy does not relate to legislation and does not guarantee a remedy by which legislation could be controlled as to its conformity with the Convention.
- In the light of Article 14 ECHR on non-discrimination, in conjunction with Article 1 of the First Protocol on the protection of property, it is not precluded that retroactive legislation is adopted in order to prevent taxpayers from getting involved in manoeuvres of

32. Joined Cases C-290/05 *Nádasdi* and C-333/05 *Németh*, ECR 2006, p. I-10115, Paras. 62-63.
33. C-453/00, ECR 2004, p. I-837, Para. 28. See also: Joined Cases C-392/04 and C-422/04 i-21 *Germany, Arcor AG*, ECR 2006, p. I-8559, Para. 72; C-119/05 *Lucchini*, ECR 2007, p.I-6199, Para. 63; C-2/06 *Kempter*, ECR 2008, p. I-411, Para. 46.
34. Application No. 8531/79 by A., B., C. and D. v. the United Kingdom, decision of 10 March 1981 on the admissibility of the application.

tax avoidance. Such a law can be justified to the extent that combating tax avoidance can be recognized as a reasonable legislative aim. The retroactivity of legislation is not disproportionate to the aim sought to be realized if it is necessary for fully achieving this aim. The provision of Article 1, Paragraph 2 of the First Protocol on the right of a state to secure the payment of taxes can be applied to a legislative measure, which is designed to prevent tax avoidance.

The Hungarian Constitutional Court also confirmed several times that the legislator widely enjoys freedom in changing the conditions of the share in public burden, including the payment of taxes. Retroactive legislation still cannot be recognized, as discussed above. The Hungarian standard developed by the Constitutional Court is thus higher, compared to the practice of the ECtHR, which seems to be more lenient in this respect.

In the case of *M.A. and others*,[35] it was discussed before the ECtHR that the Finnish parliament adopted in September 1994 an amendment to the existing income tax law with a planned effective date of 1 January 1995. Having been informed of the proposed amendment, a series of Finnish companies accelerated the right of eligible employees to exercise the rights, which were secured to them by employee stock option programmes, with a view to escaping being subject to the less beneficial taxation expected as a result of the proposed legislative changes. Reacting to these manoeuvres, the Finnish parliament adopted the new law in December 1994 with a retroactive effect to September 1994, applicable to the taxpayers who took part in employee stock option programmes and whose programmes provided after September 1994 for acceleration. The ECtHR approved the procedure of the Finnish legislator. In the light of the Hungarian practice the Constitutional Court has developed so far, it is most likely that such a piece of retroactive legislation would have been repealed as unconstitutional.

As seen in in *De Haan Beveer*[36], according to settled case law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force. This means that, as a rule, the ECJ not only does not approve retroactive, but even retrospective legislation in the area of substantive law. This is a practice that seems to be much more restrictive than that of the ECtHR, and as much restrictive as the Hungarian practice. Notably exceptions to the prohibition of retroactive legislation are not unprecedented in the ECJ practice.[37]

In *Stichting 'Goed Wonen' II*, it was held that when the new law exempts an economic transaction in respect of immovable property previously subject to VAT, it may have the effect of revoking a VAT adjustment made on account of the exercise, when immovable property was used for a transaction regarded at that time as taxable, of a right to deduct VAT paid in respect of the supply of that immovable property. The principles of the protection of legitimate expectations and legal certainty do not preclude a Member State, on an exceptional basis and in order to avoid the large-scale use, during the legislative process, of contrived financial arrangements intended to minimize the burden of VAT that an amending law is specifically designed to combat, from giving that law retroactive effect when economic operators carrying out economic transactions such as those referred to by the law were warned of the impending adoption of that law and of the retroactive effect envisaged

35. Application No. 27793/95 by M.A. and 34 others against Finland, decision at Strasbourg on 10 June 2003.
36. C-61/98, ECR 99, p. I-5003, Para. 13.
37. C-368/89 *Crispoltoni*, ECR 1991, p. I-3695, Para. 17, C-376/02 *Stichting 'Goed Wonen'* II, ECR 2005, p.I-3445, Para. 32.

in a way that enabled them to understand the consequences of the legislative amendment planned for the transactions they carry out.[38]

It follows from the above analysis that the Hungarian position developed by the Constitutional Court is quite restrictive. As emphasized, retroactive tax legislation is not possible, unless exceptionally, and exclusively in favour of taxpayers. The Constitutional Court is also steady in its practice, not repealing the legal provisions held to be unconstitutional with a retroactive effect. Retrospective legislation is approved in the administrative tax law area where the new law may apply to pending cases; however, again with the proviso that changes in the law may not affect taxpayers badly. In the substantive tax law area, legislation with immediate effect must be normally accompanied by grandfathering. It is still an exception to the strict Hungarian standpoint that the provisions of anti-avoidance principles are not considered to be apt to create individual rights and obligations. As a consequence, they may (and must) even be legislated retroactively, although they may not violate taxpayer rights.

Compared to the ECJ judgment in *Stichting 'Goed Wonen' II*, the Hungarian practice seems to be anachronistic in that the Constitutional Court requires that those who are addressed by the new law should be provided with a copy of the official gazette with the new law. The Constitutional Court does not take into consideration that it may well happen before both the ECJ and the ECtHR that taxpayers can be expected to be informed of the legislation by press release. The above-mentioned rigid features of the Hungarian practice can be explained, as discussed, by the history of the political transition. In a new democracy, sensibility is shown at legal forums to changes that would impair legal certainty and stability. This is why mistrust of retroactive, and even retrospective, legislation has been widespread to date.[39]

Arguments for retroactivity cannot be easily accepted in a Central and East European country like Hungary because as the Hungarian law stands at present instability can hardly be tolerated. If the high-level instability of the legal system were further enhanced by broad retroactive legislation, it would undermine social cohesion. A dynamic theory that argues for the acceptability of retroactive legislation depending on a state of instable equilibrium is viable, provided that the outcome of a stable equilibrium is as much likely as an unstable one. For the lack of such a balance, however, a theory, which is otherwise complex and elastic, does not seem to be operative. One can conclude that retroactive legislation is a kind of luxury, which a sophisticated legal system can allow. In a less balanced society, the elbow-room for policymaking is more restrictive and the legislator's power is more fragile. The considerations of efficiency and the opportunity of market remedies do not seem to be sufficient to compensate the threat of disintegration. The tax legislature in Hungary enjoys a relatively large amount of freedom, including the possibility of the milder forms of retroactive (or rather retrospective) legislation. This does not yet mean that even the tax legislator would not be disciplined by the standards the Constitutional Court has laid out.

---

38. Para 45. The taxpayer granted a usufructuary right in rem on 28 April 1995, the Netherlands government announced its intention to amend the effective law already on 31 March, the bill was submitted to the parliament on 23 May and adopted by it on 18 December with a retroactive effect to 31 March.
39. A theory of equilibrium would be permissible for retroactivity in a state of flux. In the context of a stable equilibrium, the lawmaker should avoid retroactivity. See: Jill E. Fisch, *supra* note 7, at p. 1106. Change is relatively easy in an unstable equilibrium, however, and relatively little force is needed to effect change in this respect (p. 1108). The likelihood of legal change mitigates the potential fairness problems, and efficiency will in turn be appreciated. Arguments for retroactivity are more compelling in such a context (p. 1109).

3.11.
Italy

Fabrizio Amatucci

3.11.1. Terminology

3.11.1.1. Distinction between retroactivity and retrospectivity

a. In general

Usually in Italian legal discourse there is a distinction between the concepts of retrospectivity and of retroactivity.[1] Nevertheless, in the field of taxation the distinction between two concepts do not have the same meaning[2] and sometimes retrospectivity is considered in the same way as retroactivity.[3]

Generally the tax literature uses different terminology: *retroattività propria* o *vera retroattività* (true retroactivity)[4] similar to material retroactivity or retrospectivity to explain a situation concerning cases in which a new statute changes a previous statute with negative effects for taxpayers affecting results of past events for the future and to distinguish it from formal retroactivity (*retroattività impropria* or *richiamo circostanziato dei fatti*). In the latter case there is no change in a previous statute but just reference to facts occurring in the past (i.e. tax amnesties).

This distinction in case law and tax rules (legislation) is usually unclear. There is often no reference to this distinction by tax courts. Furthermore, there is sometimes confusion between the two concepts.

b. Conceptual distinction between a statute that applies to a previous year (actual retroactivity) and a statute that applies as from the beginning of the current year (de facto retroactivity)

The conceptual distinction between actual and de facto retroactivity[5] is employed in Italy where it is referred to as '*retroattività autentica* (real retroactivity) when a statute applies from the beginning of the current year and *non autentica* (unreal retroactivity) when a statute applies to a previous year. In particular, in tax case law while the former is not admitted, sometimes the latter is admitted and is considered compatible with prohibition of retroactivity because there is no violation of the actuality of ability-to-pay principle if the current fiscal year is still not concluded when the new statute comes into force, changing tax rules from the beginning of the same year (see Constitutional Court decisions nos. 341/2000 and 16/2002).

---

1. R. Quadri, *Disposizioni sulla legge in generale in Commentario al codice civile*, (Bologna-Roma: Scailoja Branca, 1974), at p. 92.
2. F. Amatucci, *L'efficacia nel tempo della norma tributaria* (Milano: Giuffrè, 2005), at p. 13.
3. V. Mastroiacovo, *I limiti alla retroattività nel diritto tributario* (Milano: Giuffrè, 2005), at p. 310. The effect of retrospectivity is not to alter or modify a previous statute or of a past event for the future.
4. G.A. Micheli, *Corso di diritto tributario* (Torino: Utet, 1989), at p. 61, Amatucci, *supra note 2*, at p. 8.
5. V. Thuronyi, *Comparative Tax Law* (The Hague: Kluwer Law International, 2003), at pp. 79-80.

3.11.1.2. **Relevance of tax period**

a. Phenomenon of 'interpretative statutes explicitly known'?
The interpretative statute is known in the Italian tax system and it is called '*legge di interpretazione autentica*'.

b. Legal basis for interpretative statutes and special term for this kind of retroactivity
There is no legal basis in the Constitution for the retroactive effect of an interpretative tax statute, but we can find it in Article 11 of *preleggi of codice civile* and in Article 1 para. 2 and Article 3 of the Statute of taxpayer's rights (L. no. 212/2000) where interpretative law (*legge di interpretazione autentica*) can be recognized even if by way of exception.

The special term used for this kind of retroactivity is: '*norma effettivamente interpretativa*'.

3.11.1.3. **Standards used for characterization as 'interpretative statute'**

To determine whether a tax statute can be considered to be a '*legge di interpretazione autentica*' and whether it is really interpretative, the standards are uncertainty and unclearness of a prior tax statute or provision (to be interpreted) or a different or contrasting interpretations by the tax court [6] or by the tax authorities. It is necessary for the interpretative statute to impose the correct meaning of an uncertain tax rule without addition and update (*ius novum*). The case of confirmation of the view of tax authorities can be regarded as a problem (see section 3.11.1.4).

3.11.1.4. **Validation statutes**

a. Phenomenon of interpretative statutes explicitly known?
The Italian legal system does not recognize the phenomenon of 'validation statute'. However, the Italian academic literature sometimes recognizes validation statutes referred to as '*convalida legislativa*[7]' when the legislator introduces a new tax rule by means of an interpretative statute specifically to validate a 'minority tendency' in case law or a certain view taken by the tax authorities or to overrule a judicial decision.

b. Standards used for characterization as 'validation statute'
The standards used to determine the 'validation statute' are the intention to prevent with retroactive effect a consolidated case law tendency that is not compatible with tax policy or to validate an interpretation made by the tax authorities that is not favourable to the taxpayers for tax reasons or to validate a legal practice. The validation statute is a type of abuse of legislative judicial activity.

c. Difference between a 'validation statute' and 'interpretative statute'
A validation statute is generally incompatible with the bona fide principle and the principle of legitimate expectations[8] and it can be considered an intrusion by the legislator on the judicial activity of the tax court. When the interpretative statute has no aim other than the

---

6. In some cases the Constitutional Court (347/2000 – 525/2000) has held that interpretative statute is admissible even if there are no contrasting interpretations by the tax court.
7. Amatucci, *supra* note 2, at p. 113.
8. Sometimes even interpretative statutes are considered not acceptable because they are in violation of fundamental principles such as legitimate expectation and legal certainty. See decision of the Italian Constitutional Court no. 193/1991, 39/1993, 229/1999, 525/2000.

clarification of another statute (i.e. if the existing rule is unclear and to avoid different treatment deriving from contrasting judicial decisions), it is considered compatible with the prohibition of retroactivity. It is possible to assert that interpretative statutes can be considered legitimate because they are not in fact fully retroactive. *Full or true retroactivity* occurs when a new statute changes a previous statute with negative effects for taxpayers affecting results of past events for the future.

3.11.1.5. **Moment of entry into force**

There is sometimes a difference between the date of entry into force of a statute and its effective date (it can be a date in the past). The moment of entry into force of a statute is the publication in the government's official journal (*Gazzetta Ufficiale*) even if it refers to previous facts.

3.11.1.6. **Concept of retrospectivity**

a. In general
In the Italian tax legal system there is no a definition of retrospectivity or true and material retroactivity. This phenomenon, in the different terminology of Italian tax system (*vera retroattività* o *retroattività propria*) (see section 3.11.1.1), could be defined as the case where there is an alteration of previous tax statutes by a new statute affecting results of past events or facts for the future with negative effects for taxpayers. Generally retrospectivity of a statute is not predictable and triggers a change of the fundamental elements of tax obligation causing a violation of the actuality (or permanence) of the ability-to-pay principle and of legitimate expectations of taxpayers because it represents an obstacle to tax planning and economic activity.

b. Examples of situations that would be regarded as retrospective and not retrospective
There are several examples of situations that are regarded as retrospective or included in the material retroactivity sphere (truly retroactive – *veramente retroattive*). Generally, all situations where there is an alteration or a modification of the effect of previous rules would be considered retrospective. Another situation regarded as retrospective is the case of the repeal of multi-year tax allowances already given. There are different situations of retrospective statutes considered perhaps wrongly as interpretative rather than material retroactivity by the Italian Constitutional Court[9]; for example, Article 11 L. 413/1991 concerning taxation of capital gains deriving from expropriation and Article 14 L. 537/1993 concerning retroactive taxation of illegal earnings.

The lack of clarity of a previous rule legitimating an effectively interpretative statute and the tax amnesties are cases that would not be regarded as retrospective.

3.11.1.7. **Distinction between substantive statutes and procedural statutes: the impact of immediate effect**

a. In general
In the Italian tax system a distinction is made between substantive statutes and procedural statutes. For procedural statutes, limitation of the retroactive effect is usually excluded by general legal principles and by the principle that rules have *immediate effect* (and new rules are applicable in pending proceedings), while it is recognized for substantive statutes.

9. See Constitutional Court decision no. 315/1994 and no. 109/2002.

On the basis of this rule the statutes that will be applied by the tax administration are those in force when activity is carried out even if taxable events occurred prior to the date on which the statute enters into force.[10]

The academic literature and case law consider that the *immediate effect principle* is acceptable only if the procedural statutes are more favourable to taxpayers (*in melius*) giving them more guarantees without burdening them with further obligations. These procedural statutes should be directly applicable in pending proceedings even though they refer to past events.[11] *Ius superveniens* through immediate effect is considered in any case not applicable to situations that have been clarified and concluded before the entry into force of the statute.[12]

b. Rules considered procedural rules

Generally, the procedural rules concern taxpayers' formal obligations and they should not be retroactive if is not expressly established (Article 3 para. II of Statute of taxpayer's rights L. no. 212/2000). However, there are also procedural rules that concern evidence; these are referred to as warrantee rules '*di garanzia*'. They introduce new particular instruments for tax administration in tax assessment.[13] These rules should not be considered (as often happens) to be procedural rules because they can affect privacy and their right to defence and they should therefore not be retroactive.[14] These procedural rules in fact give new powers to the tax administration to use new documentation as evidence (for instance, assessment on bank accounts), giving rise to particular problems if they come in to force before the taxpayer is notified of the assessment.

3.11.2. Ex ante evaluation of retroactivity

3.11.2.1. Constitutional limitations to tax retroactivity

There is no principle in the Italian Constitution imposing a limitation on the retroactivity of tax statutes as there is for example in criminal law (Article 25 of the Italian Constitution). However, the Constitutional Court effectively upholds the ability-to-pay principle (Article 53 of the Italian Constitution) and in particular its 'actuality' in some cases as a limitation. Recently the prohibition of retroactivity has been based on the principle of legitimate expectations (Constitutional Court decisions no. 229/1999 and no. 525/2000) deriving from the constitutional principle of equality that is also recognized in EU law.[15]

10. See decision of Italian Supreme Court of Cassation (Corte di Cassazione) of 4.11.1999 no. 76 and of 22.12.2000 no. 16097.
11. F. Tesauro, *Istituzioni di diritto tributario* (Torino: Utet, 1999), at p. 29, Amatucci, *supra* note 2, at p. 146. See case law: decision Commissione Tributaria Centrale no. 293 of 22.01.2002.
12. See dec. Cass. no. 936 of 16.1.2009 and no. 10982 of 13.5.2009.
13. See R. Schiavolin, *L'utilizzazione fiscale delle risultanze penali* (Milano, Giuffrè, 1994), at p. 35, G. Redi, 'Segreto bancario ed efficacia nel tempo delle norme procedimentali', in: *Rivista di diritto tributario* (Milano: Giuffrè, 1997), section II, at p. 30.
14. M. Capelletti, 'La "natura" delle norme sulle prove', in : *Scritti dedicati ad Alessandro Raselli* (Milano: Giuffrè, 1971), at p. 434; R. Lupi, *Metodi induttivi e presunzioni nell'accertamento tributario* (Milano: Giuffrè, 1988), at p. 315.
15. See ECJ judgm. *Industria Salumi* case C-212/80 – 217/80 of 12.11.1981 and *Goed Wonen* case C-376/02 of 26.4.2005

3.11.2.2. **Tax transition policy of government**

There is no transition policy concerning the introduction of tax statutes. The Italian system does not have policy guidelines granting retroactive effect to statutes and grandfathering.

Sometimes transitional statutory rules and grandfathering clauses are applied to regulate the new effects on past events for a short period when a new statute comes into force to substitute or modify a previous statute.

3.11.2.3. **Ex ante control by an independent body**

a. Advisory body such as Council of State

Sometimes on rare occasions the Council of State has provided advice in the field of taxation, but it has never laid down criteria on tax retroactivity.

3.11.3. **Use of retroactivity in legislative practice**

3.11.3.1. **Use of legislating by press release**

In Italy the instrument of 'legislating by press release'[16] or communication of bills proposed in parliament is not used to provide retroactive effect from the date of press release (as in countries like Germany, *Ankündigungseffekt*). This instrument, however, is known in the literature as the announcement effect or '*effetto annuncio*'[17] publicizing a provision. Although is not recognized in the Italian system, legislating by press release might be useful to assess 'predictability', which is one of criteria used by the national tax court to justify retroactivity.

Elements that can be used by taxpayers to predict the enactment of retroactive statutes include the current economic and social situation and political trends.

3.11.3.2. **Pending legal proceedings excluded from the application of retroactive statute?**

Generally, pending legal proceedings are excluded from the application of new substantive statutes. To prevent this phenomenon Article 3 para. II of the Statute of taxpayer's rights (L. no. 212/2000) provides that the deadlines for new tax obligations or legal proceedings should be provided not before 60 days from the coming in to force of the new statute.

3.11.3.3. **Favourable retroactivity**

Following case law (decision of Supreme Court of Cassation, no. 5931/2001) and the academic literature[18], the retroactivity of tax statutes that are favourable to taxpayers is generally permitted. The Italian Supreme Court of Cassation[19] held in fact that: 'while it is true that the enactment of more favourable statutes than in the past cannot be hindered, it is also true that the right to verify the existence of the subjective and objective requisites established by new law is preserved'.

---

16. For an example, see the disputed retroactivity in the *Stichting Goed Wonen II* case (ECJ C-376/02).
17. Amatucci, *supra* note 2, at p. 90.
18. See A.D. Giannini, *I concetti fondamentali* (Torino: Utet, 1956), at p. 51; G. Bernoni, 'Sentenze della Cass. e Statuto del contribuente', in: *Il fisco* Roma, Eti, n. 28/2001, at p. 9509, G. Marongiu, *Lo Statuto dei diritti del contribuente* (Torino, Giappichelli, 2004), at p. 82.
19. Judgment Supreme Court of Cassation, Sez. I, no. 6752 of 20.7.1994.

3.11.4. Ex post evaluation of retroactivity (in case law)

3.11.4.1. Testing against the Constitution and legal principles

In the Italian legal system, the Constitutional Court usually tests the compatibility of retroactive tax statutes with the Constitution and with general legal principles. Sometimes other courts (Court of Cassation) can test the compatibility with constitutional principles or the Statute of taxpayer's rights (L. no. 212/2000).

In general, the Constitutional Court can declare a retroactive tax statute compatible with the ability-to-pay principle (Article 53 of Italian Constitution), with Article 3 of the Italian Constitution (equality principle) and with Article 41 of the Italian Constitution concerning the freedom-of-economic-activity principle or with related principles of legal certainty or legitimate expectations. Other courts examine whether the prohibition of tax retroactivity provided for by Article 3 of the Statute of taxpayer's rights is respected. In some cases justifications are accepted for granting retroactivity such as in an extraordinary economic situation (joining a single European currency) (decision of Constitutional Court no. 16/2002)[20] or in the fight against evasion and avoidance (decision of Constitutional Court no. 143/1982). In this latter case, it is considered necessary to respect the proportionality principle in the light of the other fundamental constitutional rights.

Among the justifications which can make retroactivitity compatible with the above-mentioned principles, the pursuit of the protection of a higher collective interest is generally accepted, as is the case with the curbing of tax evasion and the abuse of tax law. However, the field is sometimes extended to include 'Treasury requirements' based on extraordinary fiscal needs.

3.11.4.2. Examination method when courts rule retroactivity incompatible

The Constitutional Court, in its evaluation of legitimacy of retroactivity, has in several cases tested the retroactivity of tax statutes against the Italian Constitution and the general principles. In some cases (decision of the Constitutional Court no. 229/1999, no. 341/2000 no. 525/2000), a new (and enlarged) approach is followed and an evaluation method is used based on the principle of legitimate expectations and not on Article 53 of the Italian Constitution (ability-to-pay principle). On the basis of this principle the retroactivity of tax statutes must be justified by reasonabless and must not be in conflict with *values* and *constitutional interests.*

An interesting approach was adopted in another case of the Supreme Court of Cassation (decision no. 7080 of 14.4.2004 of Supreme Court of Cassation). It was affirmed that if a tax benefit on alcoholic drinks is withdrawn with retroactive effect for the period between the production and the sale of the product, there is a conflict with the principle of legitimate expectations.

The ECJ adopted a similar approach in the *Schlossstrasse* case (case C-396/98 of 8.6.2000) which concerned the right of taxpayers to VAT deduction that is acquired in a case in which a legislative amendment post-dated the supply of those goods or services but pre-dated the commencement of such operations.

---

20. In Decision 16/2002 (id.) the Constitutional Court, in dealing with the claim of unconstitutionality under Article 77 concerning Treasury requirements, upheld the necessity and urgency of the situation, given the extraordinary economic circumstances at the time of the financial measures of 1996. The verifying of the justification for a retroactive law in the light of the principle of proportionality has fundamental importance as does the assessment of the constitutional values involved in retroactive legislation.

3.11.4.3. Testing against Article 1 of the First Protocol ECHR

Italian courts do not test the retroactivity of a tax statute against Article 1 of the First Protocol ECHR.

3.11.4.4. Examination method for testing retroactivity of subordinate legislation against legal certainty

The approach adopted for testing against the principle of legal certainty is similar to the other situations concerning testing the retroactivity of a tax statute. Particular attention was given to whether Article 3 of the Statute of taxpayer's rights (L. 212/2000) concerning subordinate legislation had been respected.

The Supreme Court of Cassation held (decision no. 7080/2004) that the prohibition of tax retroactivity under Article 3 of the Statute of taxpayer's rights, even though it is not constitutional principle, is a helpful interpretative criterion (decision no. 41/l 2008, no. 180/2007, no. 428/2006). Even if the legislator is not bound by prohibition of retroactivity, Article 3 of the Statute of taxpayer's rights (because in hierarchy not higher than law), this rule can be useful in the court's interpretation.

3.11.4.5. Interpretations by courts to avoid retroactivity

Italian courts do not use interpretations that avoid what might be retroactive application, because such application might raise further questions about the legitimacy and validity of a retroactive rule.

3.11.4.6. Reasons for lack of judicial limits to retroactivity

The Italian courts normally recognize limits on the use of retroactivity (see section 3.11.4.2).

3.11.5. Retroactivity of case law

3.11.5.1. Temporal effect of judicial changes by courts

If a tax court abandons existing case law and formulates a new (general) rule, the Supreme Court does not provide any kind of transitional rule to limit the retroactive effect of its judgment. A limit could be represented by the principle of legitimate expectations.

3.11.6. Views in the literature

3.11.6.1. Opinions regarding retroactivity

The opinion in the tax literature is generally against unfavourable retroactivity or retrospectivity (Marongiu, Lupi, Della Valle, Amatucci).[21] The distinction between interpretative statutes and retrospective statutes is recognized (Fantozzi, Russo). Moreover, the academic literature is not unanimous on the legitimacy of (de facto) retroactivity (*retroattovità non autentica*). Some authors are in favour (Cipollina,Della Valle) and some are against it (Amatucci, Marongiu). The identification of limits to the prohibition of retroactivity through the application of legitimate expectations and ability-to-pay principles based on justifications

21. For a different position see: V. Mastroaicovo, *I limiti alla retroattività nel diritto tributaria* (Milano: Giuffrè, 2005), at p. 108.

is an interesting academic issue. The retroactive effect to tax statutes is considered justified in the presence of predictability (see section 3.11.3.1) and in the case of the achievement of economic and social objectives like the fight of tax evasion[22] when there is no conflict with constitutional principles.[23]

3.11.6.2. **Debates on law and economics view on transitional tax law**

In Italy there has been no significant debate in the tax literature comparable in any way to what has been taking place in the USA.

The problem which confronts Italian theory is how to verify whether an economic justification exists in terms of efficiency of retroactivity and its being prohibited and whether the argument can be accepted on the basis of which retroactivity and the changing of rules can make it possible to adapt to economic and social developments. The answer which is given is that the phenomenon of retroactivity cannot be evaluated in terms of economic efficiency[24]. The certainty of law which protects taxpayers overrides economic requirements which can be met through the imposition of new taxes and laws which are not unfavourable and do not have retroactive influence on effects already determined by preceding laws.

22. See G. Marongiu, *La retroattività della legge tributaria*, in *Corriere tributario*, 2002, at p. 471
23. M. Bertora, *Legittimità delle norme retroattive* in *Rivista di diritto finanziario*, 1969, at p. 156.
24. E. Allorio, *Note e pareri sull'irretroattività delle norme tributarie*, in *Diritto dell'economia*, 1957, at p. 1212, held that there can be no economic plan when there is uncertainty in the legal system.

3.12.
Luxembourg[1]

Alain Steichen

3.12.1. Terminology

3.12.1.1. Distinction between retroactivity and retrospectivity

a. Conceptual variations
The courts only refer to (formal) retroactivity. Retrospectivity is a term used by scholars only.

b. Clear distinction between 'retroactivity' and 'retrospectivity'?
We would draw the same distinction as the one indicated above (in the questionnaire; editors).

3.12.1.2. Relevance of tax period

Yes, since the triggering event for any income tax liability is the calendar year end. Hence, any tax law changes enacted during the year are technically not retroactive, even if de facto they are. We would use the term 'economic retroactivity' for those situations.

3.12.1.3. Interpretative statutes

a. Phenomenon of 'interpretative statutes' explicitly known?
The Constitution expressly provides for the possibility for parliament to interpret a law it has passed. This interpretative law would not be retroactive since it would only state the constant intent of parliament. Such laws are very uncommon in practice.

b. Legal basis for 'interpretative statutes'
Yes: Constitution Article 48 'L'interprétation des lois par voie d'autorité ne peut avoir lieu que par la loi'.

c. Special term for 'interpretative statutes'
No.

d. Standards used for qualification as 'interpretative statutes'
N/A since to date no such laws have been adopted in tax matters.

---

1. Editors' note: the replies in this report have been provided to the original questionnaire. Due to circumstances beyond his control, the author was not able to finalize the draft of his national report and to use the headings proposed by the editors. The headings used in this report are thus added by the editors.

3.12.1.4. **Validation statutes**

In Luxembourg laws may be changed in order to address unfavourable case law. If so, to date, the changes never have any retroactive effect.

3.12.1.5. **Comparison moment**

The relevant date for determining whether a law is retroactive or not is the date of publication of the law versus the date of the taxable event (31.12. for income taxes).

3.12.1.6. **Concept of retrospectivity**

The means a tax law change which in the future adversely impacts past transactions. An example of retrospectivity which has been accepted by the courts as being not a breach of retroactivity is the change of depreciation rates for existing real estate. The impact of the change would unfold in future years although the taxpayer might not have bought the asset in the past had he/she known about the changes to come. Another example is the lowering of the threshold percentage ownership from 25% to 10% enabling private taxpayers to sell tax-free shares in companies. In order to avoid retrospectivity, parliament deferred the entry into force of that provision for existing shareholdings to five years from the date of publication of the law.

3.12.1.7. **Distinction between substantive and procedural statutes**

This distinction also exists in Luxembourg, changes to procedural rules applying also to pending court cases and to dealings with the tax authorities (unless stated otherwise).

The distinction is not as straightforward as one might think. Some procedural rules are so closely linked to the substantive rules that they follow their treatment. An example would be a change of the rules on time-barrenness (when does the tax liability cease to exist?).

3.12.2. **Ex ante evaluation of retroactivity**

3.12.2.1. **Constitutional limitations to retroactivity of tax statutes**

The principle of non-retroactive is not written in the Constitution. Since 1805 it is laid down in the Civil Code and has been understood by courts over time as reflecting a general principle of law also applicable in tax matters. Because the principle has only legislative value, any law may be retroactive if parliament so decides.

3.12.2.2. **Transition policy of government**

a. Is there a tax transitional policy of government?
There are no publicly available guidelines, but in practice laws are not retroactive as a result of implicit policies.

b. Transition policy and favourable retroactive effect
Tax laws frequently have retroactive effect if favourable to taxpayers. This often is the case because the legislative process takes more time than anticipated, and parliament wants to have the new rules apply as from the date where the good news had been announced to the taxpayers by way of the government filing of the draft bill.

3.12.2.3. Ex ante control by an independent body

a. Advisory body such as Council of State
Yes, we have a Conseil d'Etat.

b. Rules to review retroactivity
The Conseil d'Etat would raise the question of retroactivity if a bill is intended to be retroactive. Ultimately, though, parliament could disregard the objection.

3.12.3. Use of retroactivity in legislative practice

3.12.3.1. Legislating by press release

a. In general
Press releases are used, though not for setting the date of entry into force of the law. Press releases are purely used for information purposes without any legal consequences attached to them.

b. Use of 'legislating by press release'
In non-tax law occasionally used. In tax law to date only where the law is favourable to the taxpayer.

3.12.3.2. Retroactive effect further back than first announcement

N/A in fact.

3.12.3.3. Pending legal proceedings – influence of retroactive tax statutes

N/A.

3.12.4. Ex post evaluation of retroactivity (in case law)

3.12.4.1. Testing against the Constitution and legal principles

The issue is not one of non-conformity to the Constitution.

3.12.4.2. Testing against Article 1 of the First Protocol ECHR

N/A, absent any retroactive tax laws. Otherwise, the ECHR could be a relevant set of rules since the ECHR supersedes contrary domestic laws as a result of the monist approach adopted in Luxembourg.

3.12.4.3. Examination method for testing against principle of legal certainty

In the few cases where retroactivity in non-tax matters has been decided upon by parliament, the courts would not have any authority to test the scope of the retroactivity against any constitutional principles, since the non-retroactivity is only a general principle with legal status which hence may be set aside by any law (though never by a governmental decree which has a lower status).

3.12.5. Retroactivity of case law

No court would ever hold in its decision that its judgment would have an effect going beyond the case it had to rule on. Whether or not its decision has a broader scope will be for the tax authorities, scholars and taxpayers to decide. Because of this, the courts would not provide for any transitional or grandfathering periods either.

3.12.6. Views in the literature

3.12.6.1. Opinions regarding retroactivity

Scholars in general are critical of any retroactivity, since it contravenes legal certainty. In the case of abuse of law rules where the taxpayer was aware of forthcoming changes (through a press release, for example), the retroactivity nevertheless is accepted.

3.12.6.2. Debate on law and economics view on transition law

The view of economists in this debate is not really being taken into consideration in Luxembourg. Generally speaking, retroactive laws are justified in Luxembourg by a relatively simple reasoning, which is not too different from the net welfare gain terminology used by some economists:

- a reasonable assumption to make as regards any change of laws is that the new law only is adopted because it is considered to be an improvement over the existing law
- in that case, the new law should be applied to as great an extent as possible; in tax law matters, this means to any cases where a tax assessment has not yet been made.
- if parliament at the end of the day does not give any retroactive effect to the new law, despite the two comments above, it is only because of principles such as the principle of legal certainty, the principle of legitimate expectations, the principle of certainty, the principle of the rule of law, the principle of justice which taken collectively are felt on balance to be more important than the efficiency aspects of retroactivity.

3.13. Netherlands

Hans Gribnau and Melvin Pauwels

3.13.1. Terminology

3.13.1.1. Distinction between retroactivity and retrospectivity

Until the PhD dissertation of the Dutch legal scholar Hijmans van den Bergh[1] in 1928, in the Netherlands discourse the concept of 'retroactivity' was linked with the doctrine of 'acquired rights' or 'vested rights'. Basically, the opinion was that a statute could be characterized as retroactive if acquired rights were infringed. Hijmans van den Bergh stated, however, that a distinction should be made between retroactive effect, exclusive effect (nowadays usually called immediate effect) and grandfathering. The advantage of this approach is that the characterization of the temporal effect of a statute is not confused with the appraisal of the temporal effect. The approach taken by Hijmans van den Bergh has generally been accepted in the Netherlands legal discourse, although some minor adjustments have been made over the course of time.

Recently, the various concepts in transitional tax law have been analysed and summarized in two PhD dissertations.[2] The conclusions of both scholars are *grosso modo* the same. They argue that, on the one hand, there are transitional rules that determine the temporal effect of the statute concerned: retroactive effect, immediate effect and delayed effect, and that, on the other hand, transitional rules may make it possible for certain existing situations to be grandfathered. Furthermore, they argue that the issue of transitional law with respect to a statute should be distinguished from the date of entry into force of that statute. The moment of entry of force marks the moment as from which the statute becomes *valid* and thus can be applied. However, to which events and to which periods the statute may then – after the entry of force – be applied depends on the transitional rules (and obviously the *ratione materiae* of the statute concerned).

Most of the time the temporal effect of a statute (*ratione temporis*) can be derived from the transitional rule in that statute, namely by means of comparing the 'effective entrance date' that the statute mentions, with the 'date of entry into force' of the statute (which latter date should be – as required by Article 81 of the Constitution[3] – on or after the date of publication of the statute in the official gazette). So, if the effective entrance date is set prior to the date of entry into force, the statute has retroactive effect; if the effective date is the same as the date of entry into force, the statute has immediate effect; and if the effective date is set on a date after the date of entry of force, the statute has delayed effect. The retro-

1. L.J. Hijmans van den Bergh, *Opeenvolgen van rechtsregels* (PhD dissertation Utrecht, 1928).
2. M.R.T. Pauwels, *Terugwerkende kracht van belastingwetgeving: gewikt en gewogen* (Retroactivity of tax legislation: weighing and balancing) (Amersfoort: Sdu Uitgevers, 2009) and M. Schuver-Bravenboer, *Fiscaal Overgangsbeleid* (Deventer: Kluwer, 2009).
3. See with respect to this provision also section 3.13.2.1.

active effect just mentioned is called 'formal retroactivity' (*formeel terugwerkende kracht*), to be distinguished from 'material retroactivity' (see below).

Please note that the above also implies that – unlike in some other countries – one speaks also of (formal) retroactive effect in case a statute enters into force at a certain moment in a tax year and is applicable as from the beginning of that year. So, unlike for example Germany, the Netherlands prevailing opinion does not use a tax period-related concept of retroactivity, but uses a taxable event-related concept of retroactivity.

As stated above, besides the transitional rules that determine the temporal effect, there are transitional rules that may make it possible that certain existing situations are grandfathered. Existing situations may partly be grandfathered, but also temporarily; these two 'options' may be chosen for one and the same existing situation. The question whether or not to grandfather not only arises when the statute has immediate effect but also when the statute has retroactive effect or has delayed effect.

If a new statute has immediate effect and existing situations are not grandfathered, the literature refers to the effect of the statute on those existing situations as 'material retroactivity' (*materieel terugwerkende kracht*). See with respect to this term also section 3.13.1.6 below.

Note that in Dutch legal language only one term (namely *terugwerkende kracht*), instead of two, is used but that an adjective (*formeel* (formal) and *materieel* (material)) is added to that term to make a distinction that corresponds to the two kinds of retroactivity for which in English two terms are used ('retroactive' and 'retrospective').

It can be concluded that in the Netherlands a distinction is made that corresponds to the distinction between retroactive and retrospective to which the questionnaire refers. The Netherlands makes a distinction between formal retroactivity and material retroactivity.

3.13.1.2. **Relevance of tax period**

As discussed in section 3.13.1.1, the Netherlands prevailing opinion does not use a tax period-related concept of retroactivity, but uses a taxable event-related concept of retroactivity.

3.13.1.3. **Interpretative statutes**

The conceptual variations that are mentioned in questions (2)-(4), i.e. interpretative statutes and validation statutes, are not commonly known in Dutch legal discourse.

It is true that the Netherlands legislator sometimes introduces a tax statute with retroactive effect and states that the statute only provides an interpretation (i.e., only clarifies the meaning) of another statute, but in the Netherlands legal system this phenomenon is not given a label, i.e. 'interpretative statute'.

3.13.1.4. **Validation statutes**

As stated above, the concept of 'validation statute' is not commonly known in Dutch legal discourse.

Thus, although it sometimes happens that the Netherlands tax legislator introduces a statute with retroactive effect to confirm a legislative practice or to 'overrule' a judicial decision that deviates from legislative practice (or only from the view of the Netherlands tax authorities), the phenomenon 'validation statute' is not recognized as such.

3.13.1.5. **Comparison moment**

As can be derived from section 3.13.1.1, the prevailing opinion in the Netherlands commonly uses the date of entry into force as the 'comparison moment'.

3.13.1.6. **Concept of retrospectivity**

The concept of retrospectivity that is used in the questionnaire has a corresponding concept in Dutch tax discourse. This concept is the above-mentioned concept of 'material retroactivity' (*materieel terugwerkende kracht*). The concept of 'material retroactivity' is, however, not well-defined in Netherlands legal (tax) discourse. Nonetheless, with respect to some events, the Netherlands prevailing opinion would agree to use the term 'materially retroactive'. For example, suppose an income tax statute enters into force on 1 January 2010, and provides that a certain tax exemption is repealed as from that date without grandfathering accrued but unrealized gains. As a result, gains that accrued prior to 1 January 2010 and that are realized after that date would not be tax exempt, although they accrued in a period when the exemption applied. Because of this result, such a statute would be called 'materially retroactive'.

3.13.1.7. **Distinction between substantive and procedural statutes**

The distinction between substantive statutes and procedural statutes mentioned in question 7 is also made in Netherlands legal practice. Hence, a new procedural statute having immediate effect is directly applicable, also to legal proceedings regarding taxable years before the moment of entry into force. For example, the Netherlands legislator made an amendment to the existing rules regarding additional assessments in 1994, which amendment held that imposing an additional assessment would be possible in the case of 'bad faith' of the taxpayer. This change was applicable to all additional assessments imposed after the entry into force, thus also to those regarding years prior to 1994.[4]

The consequences of the immediate effect of the introduction (or change) of rules regarding evidence or the burden of proof, as a matter principle depend on whether such a rule is incorporated in a procedural rule or in a substantive rule. If such a rule is incorporated in a substantive rule (e.g., 'cost of maintenance of real estate is only deductible when there are documents that can prove the maintenance') while before the legislative change the proof did not necessarily have to be provided by documents, the immediate effect of the change would generally imply that the change is only applicable to costs made after the moment of entry of force – which usually is the beginning of the next tax year. If, however, a rule of evidence or the burden of proof is incorporated in a procedural rule (e.g., the rule that in case a taxpayer has filed a tax return that is substantially incorrect, the taxpayer bears the burden of proof that the assessment imposed by the tax authorities is not correct), the immediate effect of the change would be that the change is applicable to all assessments imposed after the entry of force of the rule, thus also to assessments regarding previous tax years.

3.13.2. *Ex ante* evaluation of retroactivity

3.13.2.1. **Constitutional limitations to retroactivity of tax statutes**[5]

The Constitution contains a provision that prohibits retroactivity of criminal statutes (Article 16: 'No fact is regarded as criminal than by force of a *preceding* criminal statute'; *italics*

4. Compare Supreme Court 12 May 1999, No. 34 347, BNB 1999/258, and Supreme Court 11 June 1997, No. 32 299, BNB 1997/384.
5. See in detail M.R.T. Pauwels, 'Retroactivity of Tax Legislation; Constitutional, Judicial and Self-regulatory Limitations in Netherlands Law', in: Billur Yalti (ed.), *Retroactivity in Tax Law,* Koc University Istanbul Tax Conference Series 1, (Istanbul: Koc University Publications, 2011).

supplied). The Constitution does contain the principle of legality with regard to taxes,[6] but that provision does not explicitly impose limitations on the retroactivity of tax statutes. Furthermore, the Constitution does not contain a provision in which the principle of legal certainty (or the principle of ability to pay) is laid down either.

One might think at first sight that a ban on retroactivity is implicitly laid down in Article 88 of the Constitution. That article provides that a statute does not enter into force before the statute is published (in the official gazette). However, as mentioned above (section 3.13.1.1/ 3.13.1.2/ 3.13.1.5) it is important to make a distinction between the (moment of) entry of force of a statute and its temporal field of application. The moment of entry of force marks the moment from which the statute becomes *valid* and thus can be applied. That application, as from that moment, might also include the periods or events prior to the moment of entry of force.[7] Thus, where the legislator grants retroactive effect to a statute, it does not violate Article 88 of the Constitution.

There is an old act (the General Provisions Act (*Wet Algemene Bepalingen*)) of which Article 4 provides: 'A statute only binds for the future and has no retroactive effect.' However, according to case law of the Supreme Court this provision is not addressed to the legislator but only to the court – which may not grant retroactive effect to a statute unless the legislator has provided so.[8]

Notwithstanding the above, in Dutch legal discourse it is generally accepted that the principle of legal certainty and of legitimate expectations are general legal principles.[9] These principles are 'unwritten' constitutional norms. These principles *normatively* restrict[10] the legislator in its possibilities to grant retroactive effect. The latter is not altered by the fact that (see section 3.13.4.1 below) there is a constitutional prohibition for the courts to test acts of parliament for compatibility with general legal principles (unless such a principle is incorporated in a binding international treaty).

3.13.2.2. **Transition policy of government**

As mentioned in the explanation to this question, the Netherlands State Secretary of Finance has published – and discussed with parliament – a memorandum on transition policy.[11] The State Secretary plays a leading role in the enacting of tax legislation, so it is his task to establish a general policy.[12] This memorandum sets out the main lines of his 'transitional policy' with respect to the introduction of tax statutes. The memorandum is not legally binding, but it is influential in the parliamentary debate, for example, in the event

6. Article 104 of the Constitution: 'State taxes are imposed by force of a statute.'
7. Depending on whether or not the legislator provided retroactive effect to the statute.
8. E.g., Supreme Court No. 16 452, 13 January 1971, BNB 1971/44.
9. Compare e.g. Supreme Court No. 26 974, 7 October 1992, BNB 1993/4.
10. 'Restrict'; hence, not an absolute prohibition.
11. In the Netherlands the enactment of a statute (act of parliament) is not solely a task of parliament, but it is a task of parliament and government together (Article 81 of the Netherlands Constitution). The government is constituted by the King and the Ministers (Article 42 of the Constitution). In cases in which the Minister regards it as appropriate, the State Secretary can replace the Minister (Article 46 of the Constitution). Statutes are signed by the King and one or more Ministers or State Secretaries (Article 47 of the Constitution).
12. The State Secretary of Finance introduces most of the tax bills. He is also head of the tax administration, and as such is politically responsible for its functioning. Unlike some other countries, he is not part of the civil service. See on the key role of the State Secretary of Finance in Netherlands tax law, Hans Gribnau, 'Separation of Powers in Taxation: The Quest for Balance in the Netherlands', in: Ana Paula Dourado (ed.), *Separation of Powers in Tax Law*, EATLP International Tax Series vol. 7 (Amsterdam: International Bureau of Fiscal Documentation, 2010) and Richard Happé and Melvin Pauwels, 'Balancing of Powers in Dutch Tax Law: General Overview and Recent Developments', in: Chris Evans, Judith Freedman and Richard Krever (eds.), *The Delicate Balance. Tax, Discretion and the Rule of Law* (Amsterdam: International Bureau of Fiscal Documentation, 2011), at pp. 223-254.

that a bill includes retroactive effect. The State Secretary and parliament discuss the temporal effects of the bill in terms of this memorandum. Furthermore, lower courts and advocates-general to the Supreme Court sometimes refer to the memorandum when testing transitional rules of a statute for compatibility with Article 1 First Protocol ECHR. Also, in the tax literature the memorandum is used to discuss the fairness of the transitional rules included in a bill.

The status of the memorandum is not entirely clear. When discussing the memorandum with parliament, the Netherlands State Secretary of Finance ended the discussion by stating that the advice of the Council of State with respect to retroactivity[13] would be the guideline in the future. In practice, however, the lines of the memorandum still seemed to be used by the State Secretary when drawing up tax bills.[14] In December 2009, upon request of member of the Senate, the State Secretary however again confirmed that he agrees with the view of the Council of State. Time will tell whether the State Secretary indeed follows the criteria laid down in the view of the Council of State.

The memorandum sets out as the starting points of tax transitional policy that in principle no retroactive effect will be granted to statutes and that statutes in principle will have immediate effect (without grandfathering). The memorandum consists of two parts. The first deals with (formal) retroactivity. The second part deals with immediate effect and grandfathering (thus, also with issue of material retroactivity (retrospectivity)).

The memorandum is especially focussed on changes in legislation that are disadvantageous for taxpayers. It pays no attention to the topic of granting retroactive effect to tax statutes that are favourable to taxpayers.

In the first part of the memorandum it is stated that the question whether or not retroactivity is justified is a matter of balancing of interests: on the one hand, legal certainty of the individual taxpayers concerned and, on the other hand, the interest of the society as a whole that are served by granting retroactive effect to the statute concerned. Whether or not retroactivity in a concrete case is justified cannot be answered in general but depends on the circumstances of the case. However, two elements can be distinguished. The first element is called the 'substantive element': whether or not a justification exists for granting retroactive effect. The second element is called the 'timing element', which element refers to the period of retroactivity.

With respect to the 'substantive element' the memorandum mentions several relevant circumstances and factors that could justify retroactivity and/or that should be taken into account. In brief, these are:

- The new statute targets abuse or improper use of tax rules;
- There is an obvious omission in the existing legislation;
- Announcement effects would occur after publication of the bill if no retroactive effect is granted;
- The government's budgetary interest;
- Practical aspects regarding the implementation and execution of the tax legislation by the tax authorities.

With respect to the 'timing element' the memorandum states that the retroactive effect should in principle not reach further back in time than the moment at which the taxpayers have been informed about the intention to introduce a new statute. This latter moment is, e.g., the moment at which a bill is submitted to parliament or the moment at which a press release is issued in which the intention of introducing a new statute with retroactive effect is announced. However, retroactivity could also be justified in case the amendment concerned is 'otherwise' foreseeable, e.g. in the case of an obvious omission.

---

13. See section 3.13.2.3 for this view.
14. Pauwels, *supra* note 2, section A.3.3.

Furthermore, if there are very weighty arguments, the retroactive effect could even reach further back in time than the moment on which the regulation concerned was foreseeable for taxpayers. According to the memorandum, such arguments could be very big budgetary interests of the government or avoiding a small group of taxpayers from getting an unintended and unjustified advantage.

The second part of the memorandum points out that the question whether a statute should have immediate effect (without grandfathering) or should provide for grandfathering, is (also) a case of the balancing of interests. These interests are the legitimate expectations of the taxpayers and the interest that is served by the statute concerned. In comparison with the first part (regarding retroactivity), the second part gives less guidance with respect to the circumstances and factors that should be taken into account when balancing the interests concerned.[15] It is a pity in particular that little attention is given to the question when expectations raised by the existing law can be considered 'legitimate'. Furthermore, it would have been helpful if the memorandum had provided examples of situations in which grandfathering is considered appropriate. Most of the examples provided refer to situations in which grandfathering is not regarded as appropriate (according to the memorandum), which is obviously less informative as it is in line with the transition's starting point of immediate effect without grandfathering.

3.13.2.3. **Ex ante control by an independent body**

The Netherlands Council of State (*Raad van State*) advises the Netherlands government and parliament on legislation and governance and is the country's highest administrative court.[16] Like the House of Representatives and the Senate, which together form the States General (parliament), the Netherlands Court of Audit and the National Ombudsman, the Council of State is one of the High Councils of State. These are bodies regulated by the Constitution, each with its own specific task, which it carries out independently of the government. The Council of State provides government and parliament with independent advice on legislative proposals, i.e. bills submitted to parliament by the government.[17] In one of its advices with respect to a concrete legislative proposal, the Council of State has formulated its general criteria for examining tax transitional law.

With respect to (formal) retroactivity the Council of State says that only in the event of 'exceptional circumstances' is it allowed to grant retroactive effect to statutes that are disadvantageous[18] to taxpayers. Such exceptional circumstances could be present in the case of *considerable* announcement effects or in the case of *large-scale* tax abuse or improper use of tax rules. Please note that these requirements are stricter than those mentioned in the State Secretary's memorandum: only two circumstances are mentioned and those two are more restrictive (see the adjectives in italics). Also with respect to the period of retroactivity (the 'timing element' in the memorandum) the Council of State is stricter than the State Secretary. According to the Council, retroactivity is in any case not allowed if the regulations concerned were not sufficiently known to taxpayers at the point in time to which the retroactive effect reaches back.

---

15. The memorandum mentions factors that are relatively abstract, such as the nature of the new regulations, the nature of the old regulations, the degree of reality of the expectations, the extent of the breach with the old law by the new regulations, whether the change of the statutes was foreseeable, and whether positions taken up under, and relying on, the old law can be changed.
16. The basis for its responsibilities can be found in Articles 73-75 of the Netherlands Constitution.
17. After a bill – together with the accompanying Explanatory Memorandum – is discussed in the Council of Ministers, it goes – together with the authorization of the King – to the Council of State for advice; see Article 73 of the Netherlands Constitution and Article 15 of the Council of State Act (*Wet op de Raad van State*).
18. The advice of the Council of State does not deal with the retroactivity of favourable tax statutes.

With respect to the question of grandfathering or not, the remarks of the Council of State with respect to 'material retroactivity' (retrospectivity) are relevant. These remarks were made in an advice regarding a legislative proposal that provided that the new statute would also be applicable to existing agreements. The Council of State remarked that in case a statute has 'material retroactive effect' a balancing of interests is necessary: on the one hand, the interest of grandfathering existing agreements and, on the other hand, the financial interest of the government. The Council notes that a relevant circumstance to be taken into account is whether the taxpayers could rely on the fact that the transactions concerned were in line with aim and purpose of the law, and apart from that were not considered undesirable.

As far as we are aware, the Council of State has not indicated any general criteria for assessing favourable retroactivity.

3.13.3. Use of retroactivity in legislative practice

3.13.3.1. Legislating by press release

The Netherlands legislator occasionally makes use of the instrument of 'legislating by press release'. Please note that this instrument is in fact mentioned in the above-mentioned (see section 3.13.2.2) memorandum of the State Secretary where the 'timing element' is elaborated on. It is, however, certainly not the case that the instrument is used very often.

There are *grosso modo* three types of situations in which the instrument is used. The first is that the new statute is aimed at (existing or expected) abuse or improper use of tax rules. Without an announcement that retroactive effect will be granted to the moment of the announcement of the legislative proposal, it is feared that an announcement effect would take place, i.e. that taxpayers would just quickly make use of the loophole between the moment of announcement and the introduction of the new statute. An example of such a situation in which the instrument of 'legislation by press release' is used, can be found in the *Stichting Goed Wonen II* case of the ECJ (C-376/02). Advocate-General Tizzano was very critical with respect to the instrument[19] and concluded that the retroactivity concerned was contrary to the principle of legal certainty. The ECJ, however, did not condemn the use of the instrument in general terms, but ruled – amongst other things – that the Netherlands court should assess whether the press releases concerned were sufficiently clear to enable taxpayers to understand the consequences of the legislative proposal regarding the transactions. Eventually, the Netherlands court ruled that this was the case.[20]

The second type of situation is that an existing favourable tax policy rule (for example, a fiscal subsidy) is changed or withdrawn. In order to avoid announcement effects and negative consequences for the government's budget the Netherlands legislator sometimes considers it necessary to grant retroactive effect to the change (or, as the case may be, the withdrawal) till the moment of the public announcement of the change and its retroactive effect. An example is the withdrawal of the personal-computer facility (which facility made it possible for an employer to grant a (wage and income) tax-free allowance to an employee

19. Paragraph 38 reads: 'It is true that (…) the practice in some Member States is to give forewarning of legislative measures by means of press releases intended to apprise those affected by the legislation in due time. It appears to me, all other considerations aside, that such a practice cannot be extended to the context of a common market encompassing all European economic operators, in which the practice normally followed is inspired by the principle that the behaviour of citizens is guided and regulated by laws rather than by press releases. Indeed, as the Commission has rightly pointed out, the existence of a particular practice in a must not lead to a situation throughout the Community in which citizens in general and taxpayers in particular are called on to rely more on announcements in the press than on the law in force.'
20. Supreme Court No. 34 514, 14 December 2007, BNB 2008/37.

for the acquisition of a computer). This facility was withdrawn with retroactive effect to the moment at which the press release announcing the intention of withdrawal with retroactive effect was issued. The Netherlands Supreme Court ruled that this retroactive effect did not violate Article 1 of the First Protocol ECHR.[21]

The third type of situation concerns the situation in which the Supreme Court has given a judgment that is considered undesirable by the government. The legislator may then amend the statute involved. Sometimes, the legislator then grants retroactive effect to the amendment, often with the purpose of avoiding announcement effects. An example concerns the legislative amendment of the Personal Income Tax Act further to a judgment of the Supreme Court with respect to the exit tax on pensions when a person emigrates. The Supreme Court held, in short, that the exit tax was a 'treaty override' under the old tax treaty with Belgium. The legislator reacted to this judgment by amending some technicalities of the exit tax, with retroactive effect to the date of the press release announcing the amendment. Please note with respect to this third type of situation that the legislator sometimes even grants retroactive effect that goes further back in time than the first announcement; see section 3.13.3.2.

3.13.3.2. **Retroactive effect further back than first announcement**

It only very incidentally happens that retroactivity goes further back than the moment at which the change and its retroactive effect was announced. There are, however, three types of situations in which this sometimes happens.

The first type is a rather specific one. The situation arose after to the major and fundamental amendment of the personal income tax system in 2001, namely the replacement of the Personal Income Tax Act (PITA) 1964 by the PITA 2001. After the introduction of the PITA 2001, it appeared that this act contained several, mostly technical, errors and omissions. Therefore, the State Secretary submitted bills to repair the errors and omissions with retroactive effect reaching back to the moment of entry into force of the PITA 2001, i.e., further back in time than the moment at which the repair was announced. In its advice the Council of State agreed to the retroactive effect because it thought that errors and omissions are reasonably unavoidable in the case of such a major tax revision. However, according to the Council of State, the repair amendments that are granted retroactive effect should be minor amendments and should be reasonably expected by the taxpayers. Eventually, parliament also agreed with the retroactive effect of several of the proposed amendments.

A second type of situation is when legislation contains obvious omissions and errors. Repairing with retroactive effect till the moment the omission or error arose not only happens in the case of incorrect cross-references etc., but sometimes also in the case of substantial errors, e.g. if an amendment has the unintended result that a certain item of income is no longer taxable.

A third type of situation is that new legislation is introduced further to a judgment of the Supreme Court. In case the legislator considers the judgment undesirable, e.g. because the judgment exposes a loophole in the existing legislation and/or because of the drastic negative consequences of the (*erga omnes* effect of the) judgment for the government's budget, the legislator sometimes grants retroactive effect to the legislation that 'overrules'[22] the judgment. However, parliament is sometimes critical when the State Secretary

21. Supreme Court No. 07/10481 and 07/13624, 2 October 2009, BNB 2011/47.
22. Please note that it is not a genuine overruling, because it is usually provided that the new legislation does not affect the case in the judgment of the Supreme Court. It is an 'overruling' in the sense that the interpretation of a statute (or the rule provided) by the Supreme Court is overruled by the legislator.

submits a bill to overrule a judgment of the Supreme Court. The result may be that the State Secretary withdraws the bill or amends the bill limiting the retroactivity.

3.13.3.3. **Pending legal proceedings**

Because most of the cases of retroactivity of legislation concern the above-mentioned (see section 3.13.3.1) phenomenon of 'legislating by press release' (and therefore the period of retroactivity is limited to the moment of announcement of the amendment concerned), the retroactive effect normally does not have the effect that pending legal proceedings are influenced.

Especially, in cases in which the period of retroactivity reaches further back in time than the moment of announcement (see in this respect section 3.13.3.2), it could in theory happen that the new statute (with retroactive effect) has an influence on pending legal proceedings before the courts.[23] There are, however, no clear examples of this in the case law of the Supreme Court.

There is one example of a situation in which the tax authorities took a position in a lower court proceeding that was contrary to existing case law of the Supreme Court but in line with a bill (which included an amendment with retroactive effect) that still had to be submitted to parliament. The court ruled at a time when the bill had still not been submitted (let alone enacted by parliament) and held in favour of the taxpayer. In addition, the court condemned the tax authorities to pay the taxpayer's full legal costs because of 'abuse of the legal proceedings'.[24] In this situation, however, the statute was not in force yet and as such could not influence the outcome of the legal proceedings.

If an amendment is introduced with a far-reaching retroactive effect to 'overrule' a decision of the Supreme Court (see section 3.13.3.2), the legislator usually provides that the new statute is not applicable to the case of the taxpayer who pursued the proceedings that led to the decision concerned of the Supreme Court. This may be done in the bill but it is also possible that the State Secretary of Finance explicitly confirms this during the parliamentary proceedings.[25]

3.13.3.4. **Favourable retroactivity**

The Netherlands legislator sometimes grants retroactive effect to tax statutes that are favourable to taxpayers. It is difficult to say in which types of situations this happens, because most of the time there is little debate in parliament if favourable retroactivity is proposed by the State Secretary of Finance in a bill. Furthermore, the above-mentioned general memorandum of the State Secretary of Finance gives no attention to this topic. Moreover, in the Netherlands tax literature there is little debate and little research with respect to this issue of favourable retroactivity.[26]

Nonetheless, it seems that *if* favourable retroactivity is granted, it occurs most of the time in situations in which the field of application *ratione materiae* of a provision has a different scope than expected and intended. E.g., in the case of a favourable provision (such as a tax exemption or a tax subsidy): a certain type of situation does not fall in the field of

---

23. Note that the above statements hold for (retroactivity of) substantive statutes. Obviously, new procedural statutes are as a matter of principle also applicable to pending legal proceedings, as this is the general transitional rule with respect to procedural statutes (see section 3.13.1.7).
24. Court of Appeals of s-Hertogenbosch No. 00/2803, 16 July 2003, V-N 2003/36.5.
25. Pauwels, *supra* note 2, at pp. 315-317.
26. The main exception in the recent literature is the article by M. Bravenboer and A.O. Lubbers, 'Tijd voor uitbreiding van de Notitie terugwerkende kracht en eerbiedigende werking', *Weekblad voor fiscaal recht* (2005), at pp. 964 970.

application *ratione materiae* of that statute, while it was expected or intended that it would ('under-inclusiveness'). E.g., in the case of an 'unfavourable' provision (such as a provision that imposes a tax liability or that denies a tax deduction): a certain type of situation does fall within the field of application *ratione materiae* of that statute, while it was neither expected nor intended that it would ('over-inclusiveness'). The key factor is whether or not the field of application *ratione materiae* of the provision goes against the expectations and/or intentions with respect that field. For example, when the former Article 12 of the Netherlands CITA (which was a kind of anti-abuse rule) was withdrawn there was a lot of discussion as to whether the withdrawal should have retroactive effect, amongst other things because the provision had been highly criticized from the start. At the end, parliament decided that retroactive effect was not appropriate, amongst other things, because the arguments *pro* withdrawal with retroactive effect were not new arguments, but were arguments that had already been considered when introducing the provision.[27] In other words, it was not the case that the field of application was different from that originally expected and intended. Another example: when the Supreme Court unexpectedly ruled that cable networks should be regarded as immovable property (and not as movable property as was the assumption in practice) and therefore real estate tax was due when transferring cable networks, the legislator amended the Real Estate Tax Act, introducing an exemption for transfer of cable networks. This amendment entered into force on 1 January 2006 and was granted retroactive effect till 6 June 2003, being the date of the decision of the Supreme Court.

Finally, please note that granting retroactive effect is not the only instrument that the government has in case it considers a certain (non-)application of a provision that is disadvantageous for taxpayers to be undesirable. The same result can de facto be reached in case the tax authorities issue an 'approving' tax policy rule. In such a policy rule it is then stated that the tax authorities will apply the provision concerned in an advantageous way in the situations for which the (non-)application of the provision concerned is considered undesirable.

3.13.4. *Ex post* evaluation of retroactivity (in case law)

3.13.4.1. Testing against the Constitution and legal principles[28]

In Netherlands law, the courts are not allowed to test acts of parliament for compatibility with the Constitution, because of a constitutional prohibition to do so (Article 120 of the Constitution). Because of this constitutional prohibition the Netherlands Supreme Court held that it is allowed neither to test acts of parliament for compatibility with general legal principles that are not laid down in the Constitution.

There are exceptions with respect to the latter. The courts are permitted to test an act of parliament for compatibility with a general legal principle in case the principle concerned is incorporated in a provision of an international treaty that has direct effect. Hence, courts may examine acts of parliament for compatibility with the principle of equality as incorporated in Article 14 ECHR and in Article 1 of the Twelfth Protocol ECHR[29] (while they

27. See e.g., the arguments of the Member of the Upper Chamber (and tax law professor at the University of Tilburg) Essers in Handelingen I (*Parliamentary Proceedings of the Upper Chamber*), 29 November 2005, No. 357, p. 8, regarding bill No. 29686.
28. See also Pauwels, *supra* note 5.
29. See for an overview of the Netherlands case law in that respect, e.g., J.L.M. Gribnau and R.H. Happé, 'Equality and Tax Law: a Matter of Principle', in: *L'année fiscale: Revue annuelle* (Paris: Presses Universitaires de France, 2005), at pp. 127-143, and C.A.T. Peters, Dutch Branch Report, in: L. Hinnekens & P. Hinnekens (eds.), *Non-discrimination at the Crossroads of International Taxation*, Cahiers de droit fiscal international, 93a (Amersfoort: Sdu Fiscale & Financiële Uitgevers, 2008), at pp. 407-426.

cannot test for compatibility with the principle of equality laid down in the Netherlands Constitution). With respect to the issue of retroactivity and retrospectivity Article 1 of the First Protocol ECHR is particularly important; see section 3.13.4.3.

A second exception is that if an act of parliament falls within the scope of European Union law, the retroactivity of such an act can be tested against the general principles of European Union law,[30] e.g., the protection of legitimate expectations and legal certainty. Therefore, retroactivity as well as retrospectivity of national VAT legislation may be tested against these general principles of EU law. An important example for the Netherlands legislative practice is the *Stichting Goed Wonen II* case (C-376/02), in which the phenomenon of 'legislating by press release' was at discussion (see section 3.13.3.1).

In contrast to acts of parliament, the courts *are* allowed to examine subordinate legislation (i.e. not acts of parliament; thus, e.g., local legislation) for compatibility with legal principles, even if these principles are 'unwritten'. Therefore, the courts do examine the retroactivity of subordinate legislation for compatibility with the principle of legal certainty.

3.13.4.2. **Examination method**

Not applicable. There is no testing against the Constitution in the Netherlands; see section 3.13.4.1.

3.13.4.3. **Testing against Article 1 of the First Protocol ECHR**

As mentioned, the Netherlands courts are not allowed to test retroactivity of an act of parliament for compatibility with the 'unwritten' principle of legal certainty (unless EU law is applicable, in which case the act can be tested against the European law principles of legal certainty and protection of legitimate expectations). Therefore, taxpayers can only request courts to test the (formal and/or material) retroactivity concerned for compatibility with Article 1 of the First Protocol ECHR. In addition, since taxpayers (or at least their advisers) have become more familiar with the possibility to make an appeal to Article 1 of the First Protocol ECHR in court, there is a growing number of cases in which the courts have to rule on the compatibility of retroactivity with that provision.

However, until now the Netherlands Supreme Court has never held (formal and/or material) retroactivity of an act of parliament to be contrary to Article 1 of the First Protocol ECHR.[31] When testing retroactivity the Supreme Court often bases its analysis on the grounds of the ECHR in the *M.A.* case.[32] The reasons that the Netherlands Supreme Court had never found retroactivity in concrete case incompatible with Article 1 of the First Protocol ECHR are that, on the one hand, the ECtHR has ruled that 'a Contracting State, not least when framing and implementing policies in the area of taxation, enjoys a wide margin of appreciation' and that the legislator's assessment is accepted unless it 'is devoid of reason-

30. The answer to the question when exactly an Act can be tested for compatibility against a general principle of Community law appears to not yet be very clear. See for a view S. Douma, 'The Principle of Legal Certainty: Enforcing International Norms uUnder Community Law', in: S. Douma and F. Engelen (eds.), *The Legal Status of OECD Commentaries* (Amsterdam: IBFD, 2008), at pp. 217-249.
31. See Pauwels, *supra* note 2, section D with an overview of the case law. Please note that there is one decision of a lower court – the Court of Appeals of The Hague July 21, No. 04/03463, V-N 2007/2.10 – in which retroactivity of a statute was declared incompatible with Article 1 of the First Protocol ECHR. This decision has been discussed by Hans Pijl, 'Netherlands Tax Law Meets Human Rights Law', *European Taxation* 2006, at pp. 453-456. The tax authorities decided not to appeal this decision before the Netherlands Supreme Court, although they did not agree with the grounds of the decision.
32. ECtHR No. 27793/95, 10 June 2003, (decision), *M.A. and 34 Others against Finland.*

able foundation',[33] and, on the other hand, the Netherlands legislator has, according to the Supreme Court, not exceeded that margin in the cases in which the Supreme Court had to decide.

Note that the ECtHR is stricter towards retroactivity in the situation the retroactivity has a decisive influence on pending legal proceedings. For such a situation the ECtHR has ruled that 'the principle of the rule of law and the notion of fair trial (…) preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute.' This rule originates from case law with respect to the application of Article 6 ECHR (which provision is not applicable to pure tax cases[34]).[35] However, this rule is now also applied in the sphere of Article 1 of the First Protocol ECHR, to tax cases as well.[36] In this respect it is important that mere budgetary reasons are not accepted as 'compelling grounds of the general interest'.[37]

3.13.4.4. **Examination method for testing against principle of legal certainty**

The Netherlands courts can test retroactivity of subordinate legislation (i.e. legislation not from the national parliament, but e.g. local legislation) against the principle of legal certainty.

The Supreme Court refers to 'the legal principle based on the requirements of legal certainty that legislative measures should only apply for the future.' The Supreme Court has ruled that deviation from this principle in disadvantage for taxpayers is only justified in case of 'special circumstances.'[38] It is, however, not yet entirely clear which circumstances could qualify as special circumstances. It is clear though that 'foreseeable' could qualify as such a special circumstance. So, in case the taxation, for which the retroactive rule provides, was foreseeable for taxpayers, the retroactivity could be justified.[39] Please note that the Supreme Court has never ruled in a concrete case that the formal retroactivity at stake was incompatible with the principle of legal certainty; in most cases the taxation was considered foreseeable for the taxpayer involved.

The courts are not only permitted to test formal retroactivity but also material retroactivity (i.e. the case of not providing for a grandfathering provision) for compatibility with the principle of legal certainty. The Supreme Court has noted that 'for the principle of legal certainty (…) also respecting legitimate expectations is important.'[40] However, the courts seem to be reluctant to accept the existence of legitimate expectations; a change of the tax rate is, for example, not considered to violate the principle of legal certainty.[41] There is only one case in which the Supreme Court ruled that legitimate expectations were violated by

33. ECtHR No. 27793/95, 10 June 2003, (decision), *M.A. and 34 Others against Finland*. See also ECtHR, No. 21319/93, 23 October 1997 21449/93 and 21675/93, *National & Provincial Building Society c.s.*, paragraph 80.
34. ECtHR July 12, 2001, No. 44759/98 (Grand Chamber), *Ferrazzini against Italy*.
35. E.g. ECtHR October 23, 1997, No. 21319/93, 21449/93 and 21675/93, *National & Provincial Building Society c.s.* and ECtHR Nos. 24846/94 and 34165/96 to 34173/96 (Grand Chamber), 28 October 1999, *Zielinski and Pradal and Gonzalez and Others v. France*.
36. ECtHR No. 30345/05, 23 July 2009, *Joubert against France*.
37. ECtHR No. 30345/05, 23 July 2009, *Joubert against France*.
38. E.g., Supreme Court No. 22 456, 24October 1984, BNB 1985/59, and Supreme Court No. 43 936, 24 April 2009, BNB 2009/158.
39. E.g. Supreme Court No. 22 456, 24 October 1984, BNB 1985/59, and Supreme Court No. 43 936, 24 April 2009, BNB 2009/158.
40. Supreme Court No. 26 974, 7 October 1992, BNB 1993/4.
41. E.g. Supreme Court No. 31 920, 7 May 1997, BNB 1997/211.

the immediate effect (without grandfathering) of an amendment.[42] That case concerned a municipal tax that was to be paid for the granting of a licence by the local authorities. The tax regulations provided for an exemption for certain licences. This exemption was withdrawn at a certain moment, without, however, providing for grandfathering licences for which the application was already filed, not even for the licences for which the application was filed prior to the moment that the intention to withdraw the exemption was announced by the local legislator. The Supreme Court ruled that the exemption still applied to the latter licences, because of the principle of honouring legitimate expectations.

3.13.4.5. **Interpretations by courts to avoid retroactivity**

There are no clear indications that the courts use interpretations that avoid what might be retroactive applications. The determination of the courts whether a statute has retroactive effect and whether the retroactive effect of a statute also applies to the case at hand does not seem to be handled differently from cases in which the field of application *ratione materiae* of a statute has to be determined. Similar to these cases, the common interpretation methods are used by the courts when there are questions of transitional law. Thus, it may happen that according to the wording of the provision and its transitional provision a certain case would fall under the retroactive effect of the provision, but that the court nonetheless decides otherwise because parliamentary history shows that the retroactive effect is meant for a different type of situation than one at hand.[43] Conversely, even if a statute does not explicitly provide for its retroactivity, it is possible that the court reaches the conclusion, e.g. on the basis of the purpose of the statute and/or the history of its enactment, that that statute has retroactive effect.[44] Notwithstanding the previous remark(s), as the starting point is that statutes do normally not have retroactive effect, the courts do not easily assume that a statute has retroactive effect in case there is no indication in the statute itself that this is the case.

3.13.4.6. **Reasons for lack of judicial limits to retroactivity**

As can be inferred from the answers to the previous questions, the Netherlands courts set only few limits on the use of retroactivity of acts of parliament. The main reason is that, as mentioned above (see section 3.13.4.1), the courts have few possibilities to test retroactivity of acts of parliament because of constitutional constraints. In principle, they can only test it for compatibility with Article 1 of the First Protocol ECHR (unless EU law is applicable, in which case the retroactivity can also be tested for compatibility with the EU principle of legal certainty), which possibility does not, however, provide serious latitude for the courts, because of the ECHR's doctrine of 'wide margin of appreciation'.

Subordinate legislators seem to be disciplined with respect to the use of retroactivity. As shown above, the Supreme Court has never found the (formal) retroactive effect of a subordinate statute incompatible with the principle of legal certainty (see section 3.13.4.4). The reason may well be that the draftsmen of subordinate tax legislation (e.g. the local authorities such as the municipality) are relatively self-disciplined.

---

42. Supreme Court No. 26 974 7 October 1992, BNB 1993/4.
43. Supreme Court No. 39 617, 3 February 2006, BNB 2007/70.
44. Supreme Court No. 19 017, 7 March 1979, BNB 1979/125.

3.13.5. **Retroactivity of case law**

First of all, it should be noted that, perhaps unlike the courts of some other countries, the Netherlands Supreme Court more or less explicitly makes clear whether a certain consideration in its judgment has an *erga omnes* effect, i.e. is a general rule.[45]

If the Netherlands Supreme Court deviates from a rule that it laid down in an earlier judgment, it nowadays tends to do that explicitly. Furthermore, most of the times the Court explains why it deviates from existing case law. In case the new rule is unfavourable to taxpayers (compared to the old rule), the Court sometimes provides for a transitional rule. This latter seems even to be standard practice in the field of case law on the concept of 'sound business practice' (*goed koopmansgebruik*) to determine the annual profit of an enterprise. For example, when the Supreme Court rules that a certain type of earnings should be taken into account as taxable income at an earlier time than it would have been according to previous case law[46], the Court often provides for this in a transitional rule.[47] Such a transitional rule usually states that the new rule is only applicable to situations that arise after a certain future date. Such a rule, therefore, contains in fact two elements of transitional law. First of all, the new rule has delayed effect – i.e. the rule is applicable as from a date in the future; also called 'prospective overruling'. The second element is that situations, for example contractual obligations, that exist at that future date, are grandfathered; so, even after the future date, not the new rule but the old rule applies to those situations. If the Supreme Court provides for such a transitional rule, it usually justifies this decision by referring to the taxpayers' legitimate expectations based on the old case law.

However, in case the Supreme Court abandons existing case law and provides for a new rule that is favourable to taxpayers (and therefore unfavourable to the government's budget), the Supreme Court does not usually provide for a transitional rule. This means that the new rule is directly applicable and has in fact retroactive effect (thus, in favour of taxpayers). Sometimes, such a ruling provokes a reaction from the State Secretary of Finance, i.e. he submits a bill containing retroactive effect to 'overrule' the retroactive *erga omnes* effect of the Court's judgment in order to avoid negative budgetary consequences (see also section 3.13.3.2).[48]

3.13.6. **Views in the literature**

3.13.6.1. **Opinions regarding retroactivity**

In the literature there does not seem to be a *communis opinio* with respect to the question when retroactivity of tax legislation is justified. However, the view that retroactive legislation that is disadvantageous to taxpayers is never justified or only in extreme circumstances is losing ground. E.g., the line of two recent PhD dissertations[49] is *grosso modo* that the question whether retroactivity is permitted cannot be answered *in abstracto* but should be answered by balancing the interests concerned and by taking into account the circum-

---

45. See on the issue of how to find out whether a judgment of the Netherlands Supreme Court contains a general rule A.O. Lubbers, *Belastingarresten lezen en analyseren* (Amersfoort: Sdu Fiscale & Financiële Uitgevers, 2007).
46. Or that a certain type of expenses can only be taken into account as tax-deductible costs at a later moment than it could have been according to previous case law.
47. See e.g., Supreme Court November 13, 1991, No. 27 563, BNB 1992/109, Supreme Court December 18, 1991, No. 26 674, BNB 1992/181 and Supreme Court June 28, 2000, No. 34 169, BNB 2000/275. See also an article of one of the judges of the Netherlands Supreme Court, J.W. van den Berge., 'Fiscaal overgangsbeleid van de rechter', in: A.O. Lubbers (ed.), *Opstellen fiscaal overgangsbeleid* (Kluwer: Deventer, 2005), at pp. 35-46.
48. See for examples Pauwels, *supra* note 2, section 11.17.4.
49. Pauwels, *supra* note 2 and Schuver-Bravenboer, *supra* note 2.

stances of the legislative case. More in general, in the Netherlands literature it seems to be accepted that retroactive effect may be granted to anti-abuse rules if there is a fear of announcement effects, provided that the period of retroactivity effect is limited to the moment of the announcement and that the announcement is sufficiently clear.

Nevertheless, the general opinion in the Netherlands literature seems to be that there should be weighty arguments to justify retroactivity of tax legislation, also in case the period of retroactivity is limited to the moment of the announcement of the bill (the phenomenon of 'legislating by press release'). The latter is remarkable as it seems that in some other countries it is quite common that legislation is granted retroactive effect until the moment of the announcement of the bill.[50] Therefore, it seems that the appreciation of retroactivity partly depends on the legal culture of a country.

3.13.6.2. **Debate on law and economics view on transitional law**

The law and economics view on transitional tax law has provoked very little debate in Dutch legal discourse. E.g., in parliamentary debate no typical law and economics arguments have been used. Also in the literature there is little attention for the law and economics view.

If attention is given to this issue in the literature, most of the time it is noted that some elements of the view are interesting and have added value (e.g. attention to the behavioural effects of transition policy – such as the fact that standard practice that also in the case of anti-abuse legislation retroactivity does not go beyond the date of announcement, has the effect that there is no incentive for taxpayers not to look for loopholes as the period until the announcement will not be affected –, and the notion that grandfathering could have the (negative) effect that some taxpayers get a 'windfall gain').[51] But the view itself usually gains little support because of the strong utilitarian approach of law, in which there is little attention for fairness arguments and e.g. the intrinsic legal value of legal certainty.

50. See e.g. G.T. Loomer, 'Taxing Out of Time: Parliamentary Supremacy and Retroactive Tax Legislation', *British Tax Review* 2006, p. 68, and A. Harper, 'Tax Post Facto', *British Tax Review* 2006, p. 395 with respect to the UK and Canada.
51. See Pauwels, *supra* note 2, section 7.3.

3.14.
Poland

Piotr Karwat

3.14.1. Terminology

3.14.1.1. Distinction between retroactivity and retrospectivity

a. Conceptual variations
The Polish legal literature refers to the concept of 'retroactivity' in the broad sense of this word including the following situations:
- the statute covers the period before the date of entry into force,
- the statute covers only the period after the date of entry into force, but, having an immediate effect, may alter future tax consequences of a past event.[1]

b. Clear distinction between 'retroactivity' and 'retrospectivity'?
Although statutory laws, including the Constitution, contain no norms which would, as a general rule, prohibit or limit the retroactive effect and do not define any terms such as 'retroactivity', nevertheless, thanks to the contribution of the Constitutional Court, one can assume that the legal language employs a strict distinction between 'non-retroactivity' (defined as 'the principle of no retroactive effect of law') and 'non-retrospectivity"[2] (which includes 'the principle of protection of acquired rights' and 'the principle of protection of business in progress').[3] Both principles are derived by the Constitutional Court from the constitutional principle of a democratic state of law.[4]

3.14.1.2. Relevance of tax period

The distinction between 'actual retroactivity' i.e. a statute applying to a previous year and 'de facto retroactivity' i.e. a statute entering into force during the current year but applying to the whole year from its beginning, which is made in some countries, is not easy to find in the Polish legal or tax literature. According to 'non-retroactivity' criteria developed by the Constitutional Court, any changes in legislation potentially extending the tax burden (e.g. repealed tax exemption) in the annual tax (e.g. income tax) during a fiscal year in force from

1. A. Gomułowicz andJ. Małecki, *Podatki i prawo podatkowe* (Warsaw: LexisNexis, 2002), at p. 104; H. Litwińczuk in: H. Litwińczuk, P. Karwat and W. Pietrasiewicz, *Prawo podatkowe przedsiębiorców*, Vol. 1 (Warsaw: ABC, 2006), at pp. 73-74; A, Gomułowicz, *Zasady podatkowe wczoraj i dziś* (Warsaw: ABC, 2001), at p. 30.
2. Cases before Constitutional Court: P 40/07, *Orzecznictwo Trybunału Konstytucyjnego* 2009, No. 1, series A, item 4; K 9/95, *Orzecznictwo Trybunału Konstytucyjnego* 1996, No. 1, item 2; K 24/97, *Orzecznictwo Trybunału Konstytucyjnego* 1998, No. 2, item 13.
3. Case before Constitutional Court: P 6/07 *Orzecznictwo Trybunału Konstytucyjnego* 2009, No. 1, series A, item 2.
4. Case before Constitutional Court: U 1/86, *Orzecznictwo Trybunału Konstytucyjnego* 1986, No. 1, item 2.

the beginning of such year would be undoubtedly classified as 'actual retroactivity', as would regulations that apply to previous fiscal years.[5]

3.14.1.3. **Interpretative statutes**

a. Phenomenon of 'interpretative statutes' explicitly known?
In the Polish legal system the 'interpretative statute' has not been explicitly listed in the exhaustive catalogue of acts constituting sources of law in the Constitution.[6] In the past, the General Tax Act contained a substitute for such a solution: the Minister of Finance was guaranteed a right to issue general official interpretations of tax law, which were of a character *binding* for the tax authorities, thus *de facto* making such interpretations legal norms.[7] Nevertheless, the Constitutional Court held that the binding character of interpretations was contrary to the Constitution.[8] Currently, general official interpretations of the Minister of Finance are not binding and the legal character thereof is close to individual official interpretations (advance rulings).[9] The Ministry of Finance and the tax authorities reporting to the Ministry several times gave an interpretation according to which the character of specific amendments to a statute (introduced on the initiative of the Minister of Finance) only 'clarifies the meaning' and does not extend the subject, object or basis of taxation. According to such an interpretation, e.g. foreign exchange differences that, as a result of amendments, were added to the catalogue of taxable income, were taxable income also prior to such amendments as they were covered by the 'general' meaning of income. The administrative courts (and the Supreme Court) have usually (not always) rejected this line of interpretation, abiding by the principle that the change of provisions serves the change of a legal norm and not its 'better' interpretation.[10]

3.14.1.4. **Validation statutes**

a. Phenomenon of 'validation statutes' known?
There is no such phenomenon in Polish law as 'validation statute'. It is possible that the legislator, on the initiative of the Minister of Finance, reacts to the emerging line of jurisprudence towards an unclear provision in two ways: (1) it accepts such a line and suggests amendments to change a given provision in such a manner that its literal interpretation gives effect consistent with the common view of the courts or (2) it rejects it and amends the provision in such a manner that its literal wording no longer allows the previous interpretation of the courts. In the latter case (2), the tax authorities are particularly tempted to prove that the amendments are of a character 'clarifying the meaning' only, as mentioned in section 3.14.1.3. As mentioned above, this reasoning is not, however, supported by the courts. However, as far as the former case (1) is concerned, taxpayers in disputes with the tax authorities are inclined to state that the legislator only 'clarified the meaning' of the norm and it should had been equally understood also prior to the amendments. Such reasoning may encounter sympathy in the case law, in particular if the norm 'clarifying the meaning' in its version prior to the amendments was – in the court's opinion – contrary to European Community laws.[11] Nevertheless, contemporary tax legislation does not reveal a case where

5. Case before Constitutional Court: K 13/93, *Orzecznictwo Trybunału Konstytucyjnego* 1994, No. 1, item 6.
6. Article 87 of Constitution of the Republic of Poland (*Dziennik Ustaw* 1997, No. 78, item 483).
7. Article 14 § 2 of Act on Rules for Taxation (*Dziennik Ustaw* 1997, No. 137, item 926 as amended at *Dziennik Ustaw* 2002, No. 169, item 1387).
8. Case before Constitutional Court: K 4/03, *Orzecznictwo Trybunału Konstytucyjnego* 2004, No. 5, series A, item 41.
9. Article 14a of Act on Rules for Taxation.
10. Case before Supreme Court: III ARN 50/92, *Orzecznictwo Sądu Najwyższego Izba Cywilna* 1993, No. 10, item 181.
11. Case before Supreme Administrative Court: I FSK 641/09, www.orzeczenia.nsa.gov.pl.

the legislator introduces amendments with retroactive effect in order to reject (also with retroactive effect) the line of case law already shaped. One could state that the legislator treats any possible court decisions against the tax authorities as 'learning from error' and draws conclusions for the future.

3.14.1.5. **Comparison moment**

The Polish legal system contains a subordinate legislative regulation regarding legislative technique that provides for a possibility of entry into force of a normative act as of (a future date) with the effective entrance date as of (a date in the past).[12] However, such a formal possibility is *not* used in tax legislation due to quite a restrictive view of the Constitutional Court in this respect.[13] Neither the legislator nor the Minister of Finance, who issues subordinate legislation, will even try to grant retroactive effect to them. In the case of statutes, if the plan of legislative work indicates that the legislative process cannot be finished and the statute cannot be announced prior to the moment from which it would legally enter into force, such a moment is appropriately postponed to a future date. In the case of subordinate legislation called 'regulations' (executive acts to a statute) issued by the Minister of Finance, quite often it was a 'last-minute' practice to publish directives one or two days prior to the date on which they should enter into force in order to allow a statute to function properly. The moment of 'publication' is indicated by the date of issue of „*Dziennik Ustaw*' (the Polish Journal of Laws), which – until 2012 – was not necessarily the same as the date of actual availability of a given Journal of Laws.[14] The above-described practice was dangerously close to the line of 'non-retroactivity' and may even have overstepped it. The Minister of Finance, however, usually ensured availability of a normative act, making its text available on his official Internet website[15] prior to the moment of its entry into force. Besides, it has to be admitted that this 'last-minute' practice has significantly decreased recently.

3.14.1.6. **Concept of retrospectivity**

a. Definition of retrospectivity

The Constitutional Court derived from the constitutional principle of a democratic state of law, among other things, two principles complementing each other: (1) protection of acquired rights and (2) protection of business in progress, both of which are the manifestations of the principle of certainty of tax law.[16] Breach of any of such principles might be classified as 'retrospectivity' within the meaning in section 3.14.1.1.b. The principle of protection of acquired rights contains the postulate of a taxpayer's legal security consisting in the fact that his rights acquired under a statute would not be suddenly and unreasonably abolished or restricted. The principle of protection of business in progress is a postulate for the legislator in order to take into account the fact that many actions taken by a taxpayer are spread over time. A taxpayer makes a decision on a given undertaking, acting in specific legal conditions, including tax conditions, and he has a right to expect that such conditions will not be considerably worsened during the execution of such an undertaking. Both rules are addressed to the legislator who, when abolishing or restricting norms which are beneficial for taxpayers, should not limit the rights of those who have already acquired certain powers under those norms and who intend to apply them, and the acquisition of benefits

12. Regulation by Prime Minister concerning „Rules of Legislative Technique' (*Dziennik Ustaw* 2002, No. 100, item 908).
13. Case before Constitutional Court: K 15/91, *Orzecznictwo Trybunału Konstytucyjnego* 1992, No. 1, item 8.
14. Since 2012 the Journal of Laws has been issued only in electronic version (published only on the website).
15. www.mf.gov.pl.
16. Case before Constitutional Court: P 6/07 *Orzecznictwo Trybunału Konstytucyjnego* 2009, No. 1, series A, item 2.

should be guaranteed, by way of transitional provisions, to those who undertake actions to acquire such benefits but who had not acquired them by the date of the amendments.

b. Examples of retrospectivity

There are several cases where the legislator applied certain transitional solutions to avoid the charge of 'retrospectivity':

1. The Personal Income Tax Act used to contain a tax exemption consisting in the possibility to deduct from income the expenses for purchase or construction of a residential house or a flat. Such an exemption was, after a certain time, changed to deduction from the tax of a portion of expenses. However, a taxpayer who has already incurred certain housing expenses under the ruling of the old statute was entitled to make use of the exemption under the old, more beneficial rules, until the moment of completion of the investment. The exemption was eventually abolished, nevertheless those who started housing investments under the provision remained entitled to exemption until the completion of the investment.[17] It should be emphasized that transitional provisions guaranteed not only protection of acquired rights (the right to deduct during future tax years the exemptions that have already been made) but also protection of business in progress (the right to deduct expenses already made after abolition of the exemption for an investment commenced prior to its abolition);
2. Provisions providing for full deduction in the VAT system of input tax on the purchase and leasing of cars and fuels were toughened. Amendments provided for a possibility to continue deductions under the rules applied so far, of a tax accrued on leasing instalments applied for the period after the amendments in the case of leasing agreements made prior to the amendments.[18] A formal condition was that a leasing agreement should be filed with a fiscal office on a specified date. At the same time, it has not been recognized that the immediate prohibition of deduction of the input tax on the purchase of car fuel, introduced by amendments, breached the rule of protection of business in progress;
3. As a general rule, any amendments to the Personal Income Tax Act enter into force on 1 January, i.e. as of the beginning of the fiscal year for majority of companies. For the companies whose fiscal year begins on a date different from 1 January, the legislator introducing the amendments in general provides for transitional provisions according to which new rules are binding for such companies only from the beginning of their fiscal years commencing after 1 January of a given year;[19]
On the other hand, amendments to the provisions on the statute of limitations of tax obligations should be considered permissible 'retrospectivity': in transitional provisions related to such amendments, there is a binding principle of applicable new provisions, provided that if, according to the old provisions, the statute of limitations would occur earlier, then such old provisions would apply.[20]
Cancellation of tax provisions having the character of a sanction (reference is not made here to criminal provisions but to tax obligations arising in relation to general rules) for which transitional provisions explicitly provide that since the date

17. Article 12 of Act Amending the Personal Income Tax Act and Some Other Acts (*Dziennik Ustaw* 2003, No. 202, item 1956).
18. Article 7 of Act Amending the Value Added Tax Act and Some Other Acts (*Dziennik Ustaw* 2005, No. 90, item 756).
19. Article 4 of Act Amending the Corporate Income Tax Act and Some Other Acts (*Dziennik Ustaw* 2003, No. 202, item 1957).
20. Article 20 of Act Amending the Act on Rules for Taxation and Some Other Acts (*Dziennik Ustaw* 2002, No. 169, item 1387).

of entry into force of amendments, such provisions are not applied to previous factual states, is not regarded as 'retroactivity' or 'retrospectivity'.[21]

3.14.1.7. **Distinction between substantive and procedural statutes**

Substantive statutes apply to factual states occurring after the date on which the statute enters into force, while procedural statutes apply to pending proceedings, directly after the entry into force of such statutes.[22] The subject of the proceedings, i.e. substantive law powers, including the moment of occurrence thereof, is of no importance for the determination of which procedural statutes apply in given proceedings.

The following, *inter alia*, are considered procedural rules: the rules of gathering evidence, rules of appeal, extraordinary course of repealing decisions, rules of fiscal control.

3.14.2. **Ex ante evaluation of retroactivity**

3.14.2.1. **Constitutional limitations to retroactivity of tax statutes**

As mentioned in section 3.14.1.1.b, limitations to 'retroactivity' are derived by the Constitutional Court from the general constitutional principle of a democratic state of law.

3.14.2.2. **Transition policy of government**

There are 'rules of legislative technique'[23] which also regulate the issues concerning transitional and adjusting provisions. As indicated by the title, these are rules of a technical character: recommendations as to the language of a statute, typical terms of the legislative language, layout of a normative act, etc. They do not contain any directives with regard to the creation of transitional provisions or general principles of applying a statute after its amendment in relation to future factual states, or legal relations having their sources in the events prior to the amendments.

The 'rules of legislative technique' have acquired a form of a 'regulation' being an executive act to the Act on the Council of Ministers.[24] Therefore, formally they constitute the source of absolutely binding laws. In fact, however, they are addressed only to the governmental administration. The opinion of the judiciary expressed in one of judgments in relation to the 'rules of legislative technique' is as follows: 'The regulation of the Prime Minister as regards the rules of legislative technique is not a normative act, but reflects the standards of legal culture'.[25]

The 'Rules' do not contain any guidelines with respect to granting retroactive effect to statutes or grandfathering.

There is no formalized legal act or any other document which would contain guidelines regarding retroactivity. Nevertheless, the examples given in section 3.14.1.6.b indicate that in situations where the amendments act or – depending on the individual situation of a taxpayer – may act to the benefit of a taxpayer, the transitional provisions provide for a possibility to apply the new statute with retroactive effect.

---

21. Article 13 of Act Amending the Value Added Tax Act and Some Other Acts (*Dziennik Ustaw* 2008, No. 209, item 1320).
22. Case before Voivodeship Administrative Court in Białystok: I SA/Bk 245/04, www.orzeczenia.nsa.gov.pl.
23. See section 3.14.1.5.
24. Article 14 of Act on the Council of Ministers (*Dziennik Ustaw*, 2003, No. 24, item 199).
25. Case before Voivodeship Administrative Court in Warsaw: III SA/Wa 2433/05, www.orzeczenia.nsa.gov.pl.

3.14.2.3. **Ex ante control by an independent body**

An independent body that, due to its rank and authority, could be asked for advice in the assessment of draft legal acts with respect to the question whether the granting of retroactive effect is allowed would be the Constitutional Court. Unfortunately, the Court has no such powers. It is a typical constitutional court rendering judgments regarding the consistency of already enacted legal acts with the acts of a higher rank, including the Constitution.

3.14.3. **Use of retroactivity in legislative practice**

3.14.3.1. **Legislating by press release**

'Legislating by press release' is not used in Poland due to the requirement of an appropriate *vacatio legis* imposed many times by the Constitutional Court. In the case of taxes paid annually (income taxes), in spite of lack of an express constitutional norm in this respect, it has been assumed – after the Constitutional Court – that amendments to the statutes may enter into force as of the beginning of a new year and must be announced by the end of November of the previous year, at the latest.[26] When planning the amendments, the Government must take into consideration what is known as an announcement effect and can do nothing else but accept it. It happens, however, that less radical solutions are applied to limit the announcement effect, such as the requirement to report (register) in the tax office the fact of performance of a certain action on a certain date; otherwise the tax consequences resulting from the new statute would apply to such an action.[27]

3.14.3.2. **Retroactive effect further back than first announcement**

Retroactive effect of the legislation is acceptable only in the case of amendments to the benefit of a taxpayer.

3.14.3.3. **Pending legal proceedings**

Since retroactive legislation hardly exists in Poland it is no use discussing its influence to pending legal proceedings.

However, there in an example of the non-retroactive amendment of a substantive statute, advantageous for taxpayers, accompanied by transitional *procedural* provision, that gave *substantive* retroactive effect to the benefit of the taxpayers, to whom the tax authority 'did not manage' to impose a tax (to finish the proceeding) before the date of entry into force of the amendment. In 2008 provisions on additional tax obligations, which was a specific sanction for incorrect preparation of a tax return, were deleted from the VAT Act. There was no substantive transitional provision; nevertheless, the procedural transitional provision stipulated that tax proceedings pending with regard to such obligations, in spite of the fact that they referred to the period when the old provisions still applied, were subject to cancellation, and new ones cannot be commenced.[28] This procedural solution granted taxpayers positive substantive retroactive effect, but the beneficiaries of this effect were only those taxpayers to whom the proceedings were still pending. Those taxpayers in relation to whom proceedings had already been terminated, did not make use of such 'pro-

26. Case before Constitutional Court: K 13/93, *Orzecznictwo Trybunału Konstytucyjnego* 1994, No. 1, item 6.
27. Article 7 of Act Amending the Value Added Tax Act and Some Other Acts (*Dziennik Ustaw* 2005, No. 90, item 756).
28. Article 13 of Act Amending the Value Added Tax Act and Some Other Acts (*Dziennik Ustaw* 2008, No. 209, item 1320).

cedural' retroactivity effect. The solution applied in this case was typical for criminal law rather than for tax law.

3.14.3.4. **Favourable retroactivity**

Due to the Constitutional Court's restrictive views on retroactivity, especially in taxation, the legislator is generally reluctant to introduce retroactive statutes. There is always a risk that an amendment which seems to be advantageous for everyone will turn out to be disadvantageous in some specific circumstances.

Nevertheless, sometimes the legislator decides that the legislation could be retroactive if there is no risk of potential negative effect for taxpayers.

The most common fields for favourable retroactivity are:

1. optional solutions (e.g. individual depreciation rates, simplification schemes, optional lump-sum taxes or flat rates, etc.);
2. tax rates reductions, tax reliefs, exemptions (in the case of VAT – only optional exemptions);
3. new procedural solutions (e.g. advance rulings, electronic tax returns, etc.).

Sometimes the reason why the amendment is considered favourable is the increased level of certainty of tax law. In such a case the retroactive effect is also acceptable. For instance, new legislation regarding the tax consequences of leasing was published during 2001. It entered into force in September 2001 but covered the whole year 2001.[29]

Amendments to the provisions of limitation (expiration) of tax liabilities are also considered favourable retroactivity if the transitional provisions provide for the *lex benignor* principle: new provisions are applicable unless, according to the old provisions, the tax liability would expire earlier; then such old provisions would apply.[30]

3.14.4. *Ex post* **evaluation of retroactivity (in case law)**

The Polish Constitution explicitly formulates the principle of its primacy and direct application.[31] The administrative courts, however, when rendering judgments not only in tax cases, express a unanimous opinion that such a provision does not entitle the courts to refuse application of a provision of a statutory act, the non-constitutionality of which has not been established by the Constitutional Court.[32] A provision of a statute is deemed constitutional as long as its non-constitutionality has not been established by the Constitutional Court. Administrative courts refuse to apply subordinate legislation if it is found to be contrary to the Constitution or statutes. Usually, however, the basis on which subordinate legislation is being contested is the fact that it was issued without statutory authorization or handles matters reserved for a statute. Charges of retroactivity happen sporadically (such charges were reported in the 90s in relation to a directive on the depreciation of fixed assets, which entered into force during a fiscal year with effect from the beginning of that year).[33] Administrative courts more and more frequently refuse to apply the provisions of tax statutes, which are recognized by the courts to be contrary to the provisions of European Community

---

29. Act Amending Personal Income Tax Act, Corporate Income Tax Act and Value Added Tax and Excise Act (*Dziennik Ustaw* 2001, No. 106, item 1150).
30. Article 20 of Act Amending the Act on Rules for Taxation and Some Other Acts (*Dziennik Ustaw* 2002, No. 169, item 1387).
31. Article 8 item 2 of the Constitution of the Republic of Poland (*Dziennik Ustaw* 1997, No. 78, item 483).
32. Cases before the Supreme Administrative Court: II FSK 852/07, II FSK 1013/06, II OSK 548/06, website: orzeczenia.nsa.gov.pl.
33. § 17 of Regulation by Minister of Finance concerning assets regarded as fixed assets, rules and rates of depreciation and terms of updating of assessment of fixed assets (*Dziennik Ustaw* 1992, No. 30, item 130).

law.[34] This concerns, however, the cases of conflict with specific provisions of tax directives, and not the infringement of the prohibition of retroactive effect.

As we can see, in the case of statutes, recognition of inadmissible retroactivity of a provision by the administrative court is practically impossible. In the case of regulations, it is possible to refuse application thereof, but other reasons, other than retroactivity, are dominant.

In practice, the Constitutional Court is the only judicial body entitled to test the retroactivity of tax statutes. If the statute has a disadvantageous impact on taxpayers, the retroactivity is considered unconstitutional.

3.14.5. **Retroactivity of case law**

3.14.5.1. **Temporal effect of judicial change of course**

In tax matters, the highest judicial authority is the Supreme Administrative Court. This is a court of second instance whose judgments are binding only in the case in which they were rendered. If an administrative court sitting in a normal composition comes to the conclusion that it encountered a complicated legal issue, then it will file an application for a resolution to be taken in the composition of seven judges, the whole chamber or the full composition of the Supreme Administrative Court. Also such a resolution will not be absolutely binding (it is binding only in that particular case); nevertheless, if in any other case the administrative court does not share the view of such a resolution, then the court is obliged to address that particular legal issue to be resolved again in the form of a resolution.[35] A resolution, similarly to all other court awards, has retroactive effect in the sense that legal views presented in such resolutions are binding for the courts and authorities examining the given case in spite of the fact that those views were obviously pronounced after the occurrence of the event concerned.

A separate issue is the effectiveness of the judgments of the Constitutional Court. As a general rule, the judgment of the Constitutional Court regarding non-constitutionality of a provision enters into force as of the date of its announcement. Nevertheless, the Court may decide on a later date on which the non-constitutional provision will cease to be in force.[36] The above-mentioned regulation could suggest that the judgments of the Court are not of a retroactive character. In practice, however, procedural provisions are of key importance, making it possible to reopen proceedings in the case finished by a final decision if it had been based on a provision, the non-constitutionality of which was subsequently recognized by the Constitutional Court. On the other hand, the taxpayers, in whose case no proceedings were pending but who paid on their own the tax which was due on the basis of a provision then repealed by the Court, are entitled to demand reimbursement of overpaid tax.[37]

34. Case before Supreme Administrative Court: I FSK 2105/08, www.orzeczenia.nsa.gov.pl.
35. Article 269 of Act on Proceedings before Administrative Courts (*Dziennik Ustaw* 2002, No. 153, item 1270).
36. Article 193 item 3 of Constitution of the Republic of Poland (*Dziennik Ustaw* 1997, No. 78, item 483).
37. Article 74 of Act on Rules for Taxation (*Dziennik Ustaw* 1997, No. 137, item 926).

3.15.
Portugal

Glória Teixeira[1]

3.15.1. Terminology

3.15.1.1. Distinction between retroactivity and retrospectivity

a. In general

In Portugal constitutional, tax and civil law use the word 'retroactivity'. 'Retrospectivity' is a term used by the prevailing opinion and in the tax literature where it is called 'inappropriate retroactivity'.

The Portuguese Civil Code in Article 12º, n.º 1 provides the general rule of time application of laws (*tempus regit actum*), but does not forbid the retroactivity of law. According to the same code (see Article 13º, n.º 1), retroactivity is even the normal solution in the case of authentic/truly interpretative statutes.

The Portuguese Constitution deals with the concept of retroactivity in several articles: Article 18º n.º 3 – prohibiting retroactivity of the laws restricting freedoms, liberties and guarantees; Article 29º n.º 4 related to criminal law and Article 103º n.º 3 prohibiting retroactivity in tax matters.

Also, the General Tax Law, ('LGT – Lei Geral Tributária') refers to the prohibition of the creation of retroactive taxes on Article 12º, n.º 1.

Before the constitutional revision of 1997, the Portuguese Constitutional Court had already accepted the principle of non-retroactivity as a valid one. However, the Court defended that only cases of intolerable retroactivity were strictly forbidden because of the principle of legal certainty and trust (Article 2º of the Constitution), which implies a minimum of certainty of law and respect for previously created expectations of citizens.

In fact, this system reflected some European ideas. During the formation of the modern tax state in Europe, taxation has been an attribute of democracy with the limits of '*no taxation without representation*'.[2]

After the constitutional revision of 1997, the Constitutional Court seems to have adopted a stricter approach. This approach can be examined with regard to at least three questions: is retroactivity in tax matters forbidden even if the new law is to the benefit of the taxpayers? Concerning direct taxation with respect to a tax that it is imposed in certain periods of time (normally, on a yearly basis), can the new law published in the middle of the year 'n' only be applied in the year 'n+1' or are other solutions also possible (e.g. a *pro rata temporis* solution in the year 'n' or even its application to the first of January of year 'n')?

---

1. I would like to thank the CIJE researchers – Patrícia Azevedo, Sérgio Silva, Helena Freire and Dino Almeida – for their valuable research and administrative support.

2. Generally, the courts defend an interpretation of fundamental law based on principles and general criteria (e.g., Constitutional Court Decisions -T.C, Proc. nº: 772/2007; Proc. n.º 382/01; Proc. n.º: 365/91).

Only after the constitutional review of 1997 has this 'special' principle been explicitly set forth in the Constitution, and has been reflected in the prevailing opinion and court practice. The constitutional review argues in favour of the thesis that the retroactivity would make the law uncertain and may bring about situations of injustice.

Moreover, the Portuguese legal system does not have what are known as 'validation statutes'.

b. Conceptual variations

The term 'retroactivity' can be used with various meanings. However, the prevailing opinion and tax literature tend to try to define it more precisely and make a distinction between 'proper retroactivity' and 'inappropriate retroactivity' ('retrospectivity').

The principle of 'retroactivity' prescribes that laws cannot produce effects at a date previous to their entry into force. 'Retroactivity' *stricto sensu* means that a new legal provision governs a situation that existed previous to the law's entry into force. It makes a connection between the effects of a new legal provision and factual situations that happened before the law's entry into force. It is associated to *ex tunc* force (to the past).

In contrast, 'retrospectivity' or 'inappropriate retroactivity' implies that the new legal provision has application to existing situations, although the new provision has future, *ex nunc,* effects.

This distinction is not only important in the prevailing opinion and tax literature but also for the courts in order to help them to balance constitutionally protected interests so that an evaluation of what it implies can be done.

The concept of 'retrospectivity' does not have a clear and generally accepted definition. This is because, as already mentioned, this term is used essentially in court practice and discussed by legal scholars and in the tax literature.

Retrospectivity can be defined as a kind of 'retroactivity' but an 'inappropriate' one. There is a separation of meanings between 'proper' and 'improper' retroactivity because of the difference in the effects. 'Retrospectivity' means that a new provision applies to new facts, but there was a previous context to the factual circumstances which surely created legal expectations. This distinction of treatment is important because of the principle prescribed in Article 2º of the Portuguese Constitution.

On this issue, the tax literature refers to the case of the *ultra-activity* of laws.[3] This ultra-activity implies that sometimes it is not reasonable to extinguish certain situations constituted and legally expected because of the previous law. To solve this, the legislator sometimes enacts provisions of 'transitional law'.

Furthermore, the prevailing and tax literature tend to divide 'retroactivity' into levels. This 'inappropriate retroactivity' ('retrospectivity') is what is called the second level. The facts and the effects took place according to the previous law, but the effects affect the stability and security of tax relations.

The legislative tax process involves different phases: creation, implementation, levy and collection of tax and frequently a new law comes into effect and affects citizens' expectations or their rights and obligations. In this context, the Portuguese Constitution provides in Article 103º for two types of limitations regarding retroactivity of tax laws. The first is a prohibition of applying taxes with retroactive effect and the second concerns the legality of payment and collection of taxes.

The interpretation of this provision is not unanimous in the tax literature, especially the definition of the boundaries of the second limitation.

3. Sá Gomes, Nuno, *Manual de Direito Fiscal*, volume II, Ciência e Técnica Fiscal, nº 174.

There is a general consensus that the introduction of new taxes and changes in the tax bases or tax rates may not apply retroactively.[4] However, the opinions diverge when applying the second limitation concerning the retroactivity of tax provisions regulating the payment and collection of taxes. Several authors,[5] including myself,[6] admit that the principle of non-retroactivity can be overridden in the field of payment or collection of taxes because, frequently, those provisions aim to enhance efficiency and security in the process of tax payment and collection.

There is also a different level of discussion in the domestic and comparative tax literature relating to the first limitation or the acceptable types of retroactivity when introducing new taxes and changes in tax bases or tax rates.

The principle of non-retroactivity also has a different economic and legal impact in the tax system, depending on the structure or type of tax. In the case of consumption taxes (VAT or excise duties), usually the gap between taxable facts and the occurrence of their effects is reduced or even nil and consequently the application of the principle does not raise particular problems. However, the case is different for income or property taxes or what are known as 'periodical' taxes of which the taxable event or their effect is spread, generally, through the calendar year and any legal changes during this period may create problems of retroactivity. Fortunately, in the recent Portuguese experience tax changes that have been made during the taxable period had been favourable to the taxpayer and as a result litigation was not triggered. However, the problem still persists if tax changes start to penalize the taxpayers, as is happening now, under current difficult public finance conditions. From a strict legal point of view, the final solution must be the same for both circumstances because there is no tax provision that expressly prescribes the application of the more favourable regime as is the case in criminal law.

Here, the tax literature is not unanimous. Some authors would like to see apportionment rules allocate to the respective time period the applicable law or regime. Others argue that the applicable law at the beginning or even at the end of the financial or calendar year must prevail.

In Portugal, from a strict substantive and also formal point of view, tax changes must be approved by the parliament at the time of the approval of the financial budget ('Financial Budget Law'). Public finance principles and legislation require, for certainty and public revenue reasons, that any tax changes must be set out in that law and will apply during the next financial year. In other words, tax changes during the financial year are exceptional, if not forbidden altogether.

c. Distinction between substantive and procedural statutes

According to a rather widely accepted definition, substantive rules are those that prescribe rights, obligations and definitions related to facts. Procedural rules assure that the substantive rules are put in practice, establishing what has to be done to make substantive laws effective.

As previously mentioned, Article 103º, nº 3 of the Portuguese Constitution establishes a general prohibition of 'retroactivity' in tax matters: no one can be forced to pay illegal taxes (e.g. not created by Law or authorized Decree-Law), 'retroactive' taxes or the levy of is not legal. Furthermore, paragraph 2 of that article provides that not only taxes but also taxpayers' guarantees are created by law.

---

4. An express prohibition is included in the Brazilian Constitution of 1988 (Article 150º) and Constitutions of other Portuguese speaking countries. For further developments see Miranda, Jorge, Medeiros,Rui, *Constituição Portuguesa Anotada*, Tomo II (Lisbon: Coimbra Editora, 2006).
5. See Freitas Pereia, Manuel Henrique, *Fiscalidade*, 3ª edição, (Lisbon:]: Almedina, 2009).
6. See Teixeira, Glória, *Manual de Direito Fiscal*, 2ª edição (Lisbon]: Almedina, 2010).

The Portuguese courts accept that the 'non-retroactivity' principle of tax law must be adjusted as far as procedural rules are concerned. Firstly, the Constitution does not prohibit procedural rules having 'retroactive' effect, even when dealing with taxpayers' rights and guarantees, except in cases forbidden by Article 18º, nº 3 of the CRP. Secondly, new procedural provisions have an immediate application even in pending procedures (see Article 12º, n.º 3 of the LGT). However, a careful analysis has to be done in order to respect the 'minimum contents' of taxpayer's rights and consequently to avoid abuse or disregard for the legal certainty and legitimate expectations principle.

The opposite of the 'ultra-activity' (described in the previous section) takes place here in the context of procedural statutes. The legislator opted for an immediate application of the new provisions not only for the future but also to pending situations.

Procedural rules are laid down in the Tax Procedural Code ('CPPT – Código de Procedimento e de Processo Tributário'), in the LGT and, in some cases, in the tax statutes.

Those provisions include the regulation of issues such as reasonable time periods regarding specific procedures, taxpayers' guarantees and rights, recitals and legal causes to be invoked, briefs to be presented along with requirements of all kinds, rules on stay of proceedings, rules on limitation and dismissal, appeals; provisions on preliminary orders and also provisions related to the tax insolvency process.

There is also the inspection statute ('RCPIT – Regime Complementar do Procedimento de Inspecção Tributária') which establishes the procedure applicable in the case of tax inspections, namely rights and obligations of the taxpayers, in accordance with the principle of contradiction, and rules of procedure applicable to the tax administration, such as the right of access to the taxpayers' premises, the right of access to data and computer facilities, etc.

As far as the burden of proof is concerned, it is divided between the tax administration and taxpayer and they must prove their own respective arguments before the tax courts.

The general principle concerning the burden of proof is laid down in Article 74º and Article 89º-A, n.º 3 and 4 of the General Tax Law (LGT).

3.15.2. **Ex ante evaluation of retroactivity**

In Portugal there is an *ex ante* evaluation of retroactivity. This evaluation can be done with the control *a priori* of the constitutionality of tax statutes.

Accordingly, all main tax policies are discussed and approved under the rules of the Portuguese Constitution (Article 165º, nº1, i) of the CRP). Taxation is under the regime of reserve of law (*reserva relativa*) – government may legislate only if authorized by parliament – and this is a competence of 'Assembleia da República' (the Portuguese parliament). The government can only legislate with express authorization of the parliament and within the limits of this authorization. The legal form of tax legislation by delegation of the parliament is a law of authorization laid down in Article 165º, n.º1 and 2 of the CRP.

During the legislative process, judges and the judiciary do not intervene. The courts cannot influence the current activity of parliament because the judicial and legislative powers are separate. Only the Supreme Court's decisions have some informal influence and can constitute jurisprudence guidelines. The judicial and executive powers cannot jointly take formal part in legislative activity.

Also, under Portuguese constitutional law – Article 71º (Lei do Tribunal Constitutional),- there is another restriction based on the evaluation of the retroactivity system. It is a legal mechanism intended to be used in specific situations, to search for any violation of the Constitution, according to general principles. The Constitution imposes limits to retroactivity of tax law especially when it affects the principle of legal certainty or legitimate expectations.

In summary, in the Portuguese parliament all main tax policies are discussed and approved under the rules of the Constitution (Article 165º nº1, paragraph i). Taxation is a matter of 'reserve of law' and is a competence of Assembleia da República. The government can only legislate with express authorization of that assembly (Article 165º n.º2).

Moreover, Portuguese law does not have a policy on transition. The tax administration scrutinizes *ex ante* evaluation of retroactivity under the supervision of the Ministry of Finance and its special department 'Centro de Estudos Fiscais'.

Finally, the Portuguese Constitution includes a department called 'Conselho de Estado' (Articles 141º to 146º) and according to Article 165º, the Council of State ('Conselho de Estado') has no mandate to legislate or make legislative proposals. It functions as a political consultative organism of the Republic's President and only provides aa opinion at the President's request.

However, the analysis of non-retroactivity provisions is not allowed at the 'Conselho de Estado'.

In Portugal, retroactivity is a matter to be decided on by the appropriate legislative assembly or courts because of the special knowledge required, involving a precise and sophisticated monitoring of the law.

The Portuguese system prohibits retroactivity of tax statutes but it provides transitional rules for some of the taxes, such as the income taxes. These transitional rules exist to treat situations where taxes are formed successively and where therefore the tax is affected by the date when a new statute comes into force. These transitional provisions are carefully scrutinized by the courts when applying tax law.

3.15.3. **Use of retroactivity in legislative practice**

The instrument of 'legislating by press release' is not used in the Portuguese tax system.

Furthermore, there is no 'retroactivity period' in which the new provisions can apply to existing facts, previous to their entry into force.

Legal proceedings are governed by Article 12º, nº 3 of the General Tax Law (LGT). According to this provision, new rules have an immediate effect and new proceedings are regulated in accordance with the new law.

3.15.4. **Ex post evaluation of retroactivity (in case law)**

In Portugal there are two types of *ex post* evaluation of retroactivity. The first one (Article 281 of the CRP) is the mechanism of the abstract review of constitutionality, upon the request of several institutions (President, Prime Minister, Ombudsman, General Prosecutor, etc.). The second one is the mechanism of specific review (Article 280 of CRP): in a judicial case concerning tax matters, taxpayers can present an allegation in court regarding the incompatibility of a tax statute (or of some of its provisions) with the principle of non-retroactivity or with other general constitutional principles (legal certainty, etc.) If, *inter alia*, the court refuses to apply the tax provision on the basis of unconstitutionality or if it applies a provision the unconstitutionality of which has been raised during the judicial proceedings, the decision of the court should be, in the first case, or could be, in the second, submitted to the Constitutional Court (Articles 280 of the CRP and 71 of the Constitutional Court Statute – *Lei do Tribunal Constitucional*).

Portuguese courts usually test the compatibility with the Constitution and with general legal principles such as the principle of legal certainty. They consider 'unconstitutional' laws, 'retroactive' provisions that contravene the principles of security and predictability and reasonable expectations, in an abnormal way.

In the Portuguese Civil Law Code, Article 12º expressly states that the law only applies to future circumstances, after its publication and entry into force. Both facts and their

effects that occurred under the timing of the 'old law' cannot be subject to the new regime or, in other words, retroactivity of the new law does not apply either to past facts or their effects even if the later are postponed or extended under this new law. In contrast, in Article 13º, retroactivity is accepted in the case of interpretative laws or statutes if those do not exceed the scope and substance of the law being interpreted and also safeguard settled case law or concluded agreements.[7]

The Constitutional Court uses material criteria to fix the limits of 'retroactivity'. These limitations depend on the consequences of the 'retroactivity' as far as the expectations of citizens are concerned.

Portuguese courts do not directly test the retroactivity of a tax statute against Article 1 ('protection of property') of the First Protocol to the European Convention of Human Rights (ECHR). They use other types of procedures such as the material criteria referred above, testing the results and their effect on citizens' rights and comparing those results with the basic principles of the Constitution. However, and as a result of the supremacy of international law (see Article 8º of the CRP), it is acceptable for Portuguese courts to test retroactivity against international statutes.

3.15.5. **Retroactivity of case law**

In Portugal case law is not a source of law. Accordingly, the decisions of the Supreme Court do not constitute legal and binding rulings.

However, case law is growing in importance and there is also a tendency of the lower courts to follow the decisions of higher courts. If the lower court applies a different decision, it has to explain the reasons which support such different decision.

Also, it is possible that an interpretative rule laid down by the Supreme Court can be adopted as tax statute. This is not considered to be a breach to the principle of non-retroactivity as long as the interpretation given was predictable and was in the spirit of the rule.

3.15.6. **Views in the literature**

In Portugal there are no cases that can justify or not justify the granting of retroactive effect to tax regulations because there is a principle of non-retroactivity.

Nevertheless, the question of retroactivity in favour of the taxpayer and the question concerning the effects of the entry into force of direct taxation when it occurs in the middle of the year remain open.

It was in 1997 that the principle of non-retroactivity was inserted in the Portuguese Constitution. At that time, there were some opinions for and against it.

Those who were against it thought that the problem had already been solved with the principles in place and they argued that there was no need to define it expressly. They also argued that the principle did not solve all the problems and there were many questions left unsolved.

Those in favour of the principle argued that this was the only way to stop abuse by the legislative bodies.They also argued that the rules of interpretation could still be implemented without jeopardizing the principle of retroactivity because the interpretation rules have to be always enacted in the spirit of the law and may not create a new law.[8]

---

7. See Pires de Lima, Antunes Varela, *Código Civil Anotado*, volume I, 3ª edição (Lisbon: Coimbra Editora, 1982).
8. See Casalta Nabais, José, *O Dever Fundamental de Pagar Impostos* (Lisbon: Almedina, 1998), Bacelar Gouveia, Jorge, *A Irretroactividade da Norma Fiscal na Constituição Portuguesa*, Ciência e Técnica Fiscal nº 387 (Jul/Set, 1997) and Morais, Rui, *A Revisão da Constituição Fiscal*, Juris et de Jure, UCP (Porto, 1998).

3.16. Spain

Pedro M. Herrera and Ana Belén Macho

3.16.1. Terminology

3.16.1.1. Distinction between 'retroactivity' and 'retrospectivity'

There is no legal definition of retroactivity in Spanish law, either in the general sense or in the tax field.

In most of the Spanish literature a broad concept of retroactivity prevails, which has been passed down from civil law literature (De Castro), that makes a distinction between three levels of retroactivity (maximum-level retroactivity, medium-level retroactivity, and minimum-level retroactivity). These three levels were initially adopted in the jurisprudence of the Spanish Constitutional Court (Judgment of the Constitutional Court No. 6 of 1983).

From 1987 onwards, in Spanish constitutional jurisprudence, a distinction is made between 'authentic or proper retroactivity', or of a maximum level, and 'improper retroactivity', or of a medium level (Judgment of the Constitutional Court no. 126 of 1987). This distinction has been maintained to the present day (among the most recent decisions is found the Judgment of the Constitutional Court no. 74 of 2010).

For the Spanish Constitutional Court, 'authentic retroactivity' exists in the case of 'those legal regulations that subsequently aim to tie existing situations produced or developed prior to the law itself' and there is 'improper retroactivity' in the case of 'the regulations that aim to have a bearing on current legal situations or relations that have yet to be concluded'. The literature prefers to stick to a concept of retroactivity that refers to the structure and content of the legal tax norm[1].

In the Spanish literature, the distinction is also made between 'formal retroactivity' and 'material retroactivity' as synonyms for proper retroactivity and improper retroactivity'. The term 'retrospectivity' is not frequent, but it is also used on occasion as a synonym for 'improper retroactivity'.

3.16.1.2. Relevance of tax period

In Spain the conceptual distinction between an income tax statute that applies to a previous fiscal year (*retroactividad auténtica*) and an income tax statute that applies as of the beginning of the current fiscal year (*retroactividad impropia*) is usually employed.

According to the Spanish Constitutional Court, if the income tax rules are changed as of the beginning of the current fiscal year, this is a case of 'improper' retroactivity.

The case of 'improper' retroactivity is permitted if it does not breach the principle of legal certainty (Judgment of the Constitutional Court No. 182 of 1997).

---

1. Ana Belén Macho Pérez, *El Principio de Irretroactividad en Derecho Tributario* (Barcelona: Universitat Pompeu Fabra, 2005), at p. 612.

This conceptual distinction is materially significant, because the Spanish Constitutional Court applies different standards (see section 4).

3.16.1.3. **Interpretative statutes**

Spain has interpretative ministerial orders in tax matters (Article 12.3 of the General Tax Act (GTA)). Their inherent 'retroactive' effect is permitted inasmuch as they do not add anything new to the interpreted rule, but only point out the right interpretation. However, this view is debated in the literature, because the interpretative order restricts the scope of interpretation of a former statute.

3.16.1.4. **Validation statutes**

The legal system knows the phenomenon of 'validation statute', but according to the Constitutional Court a statute which tries to heal former unconstitutional or illegal tax debts leads to maximal retroactivity and is forbidden (Judgment of the Constitutional Court No. 116/2009 and 146/2009).

3.16.1.5. **Comparison moment**

In Spain a distinction is made between the date of entry into force of a statute and the effective date of a statute[2]. As a general rule, tax statutes enter into force twenty days after their complete publication in the Official Gazette (Article 11.1 GTA), if they do not provide for something else.

In principle, the relevant moment to compare, in order to determine whether a statute has retroactive effect or not, is the date of the entry into force of the statute, but the moment of publication in the Official Journal (and even the moment of publication of the draft statute in the parliamentary gazette) is relevant for assessing the degree of legal uncertainty caused by the retroactive effect.

3.16.1.6. **Concept of retrospectivity**

See section 3.16.4.

3.16.1.7. **Distinction between substantive and procedural statutes**

a. With respect to the impact of a statute having immediate effect
As a general rule (with the exceptions provided by transitional provisions) procedural rules do not apply to procedures initiated before the statute's entry into force (transitional provision No. 3 GTA).

b. Rules considered procedural rules
Tax assessment, tax audit and tax collection rules are considered procedural rules. The Spanish General Tax Act also characterizes rules on the burden of the proof as procedural rules (Article 105).

2. Macho, *supra* note 1, at p. 46.

3.16.2. Ex ante evaluation of retroactivity

3.16.2.1. Constitutional limitations to retroactivity of tax statutes

Article 9.3 of the Spanish Constitution (SC) prohibits the retroactivity of criminal and administrative penal provisions and of provisions which restrict individual rights. However, according to the Spanish Constitutional Court, the prohibition does not include genuine tax rules. However, the constitutional principle of legal certainty (also foreseen in Article 9.3 SC) is in conflict with the higher levels of retroactivity if it is not justified by extraordinary reasons of public interest.

3.16.2.2. Transitional policy of government

According to Article 10(2) GTA No. 58/2003, unless the contrary is provided tax norms will not have retroactive effect and will apply to taxes without a taxable period accrued after the entry in force and to other taxes the taxable period of which begins after entry into force.

3.16.2.3. Ex ante control by an independent body

Article 107 SC foresees the Council of State as the supreme advisory body of the government. Its regulation is included in the Organic Parliamentary Act No. 3 of 1980. Nevertheless there are no special requirements for requesting advice regarding retroactive rules.

3.16.3. Use of retroactivity in legislative practice

3.16.3.1. Legislating by press release

In Spain the legislator occasionally makes use of an instrument similar to the instrument of 'legislating by press release'. It is permissible to prevent announcement effects through the publication of the draft retroactive provisions in the parliament's official journal. In this case, retroactivity is permitted back to the date of publication in the journal.

3.16.3.2. Retroactive effect further back than first announcement

Sometimes the Spanish legislator grants retroactive effect to tax statutes going further back in time from the moment of its first announcement. This may be permitted, taking into account imperative reasons of general interest which are at stake and the degree of legal uncertainty which could be caused to the taxpayers (see section 4).

3.16.3.3. Pending legal proceedings

Even if the retroactive period is long, pending legal proceedings are as matter of principle excluded from the application of the new statute.

3.16.3.4. Favourable retroactivity

Retroactive effect to tax statutes which are favourable to taxpayers only apply to administrative penalties, surcharges (Article 10.2 GTA) and, occasionally, to late interest and special cases of tax liability (first transitional provision of the General Tax Act).

3.16.4. Ex post evaluation of retroactivity (in case law)

In Spain, courts can test the retroactivity of regulations for compatibility with the Constitution and with parliamentary acts. If they consider that a parliamentary act is incompatible with the Constitution they should suspend the procedure and refer the question to the Constitutional Court.

The Spanish Constitutional Court can test the retroactivity of a tax statute against the principle of legal certainty provided by Article 9.3 SC.

In Spanish practice, courts do not test the retroactivity of a tax statute against Article 1 of the First Protocol ECHR.

The Spanish Constitutional Court differentiates three degrees of retroactivity, taking into account whether the statute applies to legal situations before the publication of the statute (maximal retroactivity) to situations commenced before the publication but ended after the publication of the statute (medium or 'improper retroactivity') and those not really commenced before the publication of the law (mere expectations). This third case (minimum degree of retroactivity) is allowed. Medium or improper retroactivity is allowed, provided it does not create a serious breach of legal certainty. Maximum retroactivity is forbidden unless it is justified by serious reasons of general interest.

According to our constitutional case law:

- Statutes providing for retroactive charges with the aim of healing former unconstitutional 'fees' result in a case of maximal retroactivity which cannot be justified (Judgments of the Constitutional Court Nos. 116/2009, 146/2009, 161/2009 and 74/2010).
- If the income tax rates are increased at the middle of the taxable period (the calendar year) with effect from 1 January through a Decree-Law confirmed by a latter parliamentary act, retroactivity is possible, even if the Decree-Law is declared unconstitutional for legislating on matters reserved to a parliamentary act. This is so, because the unconstitutional Decree-Law had an announcement effect and therefore the taxpayers' legal certainty was respected (Judgment of the Constitutional Court No. 192 of 1997).
- It is constitutional to abolish permanent tax allowances from a periodical tax on real estate without granting any transitional rights for future taxable events (grandfathering). In this case there is no real retroactivity or acquired rights but merely taxpayers' expectations (Judgment of the Constitutional Court No. 6 of 1983). However, it is unconstitutional to abolish exemptions applicable to already accrued taxable events (Judgment of the Constitutional Court No. 234 of 2001, regarding excise duties).
- It is constitutional to increase the tax rate of already accrued tax debts on gambling devices if there are reasons of public interest to do so, e.g. past extraordinary profits which were taxed at a very low rate where the business activity is not desirable (Judgment of the Constitutional Court No. 126 of 1987). If such reasons do not exist, the retroactive taxation is unconstitutional (Judgment of the Constitutional Court No. 173 of 1996).

3.16.5. Retroactivity of case law

3.16.5.1. Temporal effect of judicial change of course

According to Article 40 of the Organic Parliamentary Act on the Constitutional Court, constitutional judgments cannot revise final judgments (*res iudicata*), with the only exception of criminal judgments or judgments on administrative penalties, where the penalty or responsibility should be reduced as a consequence of the unconstitutionality. Regarding tax matters, the Constitutional Court has the tendency to explicitly reject the reimbursement of unconstitutional tax debts if they are final (Judgment of the Constitutional Court No. 45 of 1989). However, in several cases the Supreme Court has considered that this limitation of

effects must be helpful through a right to damages equal to the amount of the tax paid and the late interest (Judgments of the Supreme Court of 22 February 2005 and 5 December 2006).

3.16.6. Views in the literature

3.16.6.1. Opinions regarding retroactivity

The literature generally agrees that retroactivity of tax statutes is constitutional provided the legal certainty is not affected in a disproportionate way. However, it is considered that the distinction made by Constitutional Court of three degrees of retroactivity is too formal and does not reflect the severity of the breach of legal certainty.

3.16.6.2. Debate on law and economics view on transitional law

The law and economics view on transitional tax law has not led to debate in Spain.

3.17. Sweden

Katarina Fast, Peter Melz and Anders Hultqvist

3.17.1. General introduction

The Swedish Constitution is based on four constitutional statutes: the Instrument of Government, *Regeringsformen* (1974:152), the Act of Succession, *Successionsordningen* (1810:0926), the Freedom of the Press Act, *Tryckfrihetsförordningen* (1949:105) and the Fundamental Law on Freedom of Expression, *Yttrandefrihetsgrundlagen* (1991:1469).[1] The Instrument of Government contains the main provisions. The Riksdag Act, *Riksdagsordningen* (1974:153) comprises provisions on the rules for parliament. Only the Instrument of Government (IG) and the Riksdag Act (RA) are relevant for this report.

The Swedish Instrument of Government (IG) of 1975 does not mention any general prohibition concerning retrospective legislation. However, in chapter 2 IG there is an explicit prohibition of retrospective legislation regarding criminal law and tax law.

In practice, the IG is of rather limited importance in the legislative process as well as regarding the application of the law. Some of the reasons mentioned in the Swedish doctrine are the lack of constitutional tradition in the courts and the weak elements concerning the separation of powers in the Swedish Constitution.[2] However, the IG has gradually increased in importance since the entry of Sweden into the European Union in 1995 and the Europeanization of Swedish legal culture.[3]

The Swedish Constitution is not clearly based on the principle of separation of powers as in the case of most European countries, but focuses on what is known as the principle of the people's sovereignty (*folksuveränitetsprincipen*) with a diversity of functions (*funktionsfördelning*). According to Chapter 1, Article 1 IG 'All public power in Sweden proceeds from the people. Swedish democracy is founded on the free formation of opinion and on universal and equal suffrage. It shall be realized through a representative and parliamentary polity and through local self-government. Public power shall be exercised under the law.'[4] This means that the courts are subordinate to the parliament (*Riksdagen*), even though politics

---

1. The articles of the Swedish Constitution referred to in this report are all in accordance with the official English version: *The Constitution of Sweden – The Fundamental Laws and the Riksdag Act*, (Stockholm: Sveriges Riksdag, 2000). The official English version is also available at the homepage of the Riksdag, www.riksdagen.se.
2. See for example Thomas Bull, 'Konstitutionella snedsteg – en studie av svensk trohet mot grundlag', in: Eivind Smith and Olof Petersson, eds., *Konstitutionell demokrati* (Stockholm: SNS Förlag, 2004), at p. 86; Persson claims that in general, there is a lack of legal principles in the explanatory statements for new legislation, even in an international perspective; Asa Persson, *De politiska partiernas rättspolitik*, (Uppsala: Iustus förlag, 2004), at p. 299.
3. See for example Joakim Nergelius, *Förvaltningsprocess, normprövning och Europarätt* (Stockholm: Norstedts juridik, 2000).
4. The reform of the IG in 2011 indicates however a trend towards a strengthening of the principle of separation of powers in Sweden. The so called "manifest criterion" concerning judicial review of legislation by the courts and other public bodies (*lagprövning*, se further 3.17.5) has been repealed. There have also been changes in the rules regarding the appointment of judges.

and the administration of justice are treated as two separate areas.[5] There is also an obligation for the legislator to pay regard to the European Convention of Human Rights and the Fundamental Freedoms from 1950 (ECHR) under Chapter 2, Article 19 and the law (1994:1219) on the European Convention of Human Rights and the Fundamental Freedoms.

Fundamental rights and freedoms are regulated in Chapter 2 of the IG. It contains *absolute rights*, which may not be limited by other means than through a change of the IG (a constitutional amendment) according to a particular procedure mentioned below.[6] *Relative rights* may in principle be changed by 'ordinary' law, which means a decision by the parliament in which more than half of those voting concur (Chapter 4, Article 7 IG).

The Constitution can be amended according to Chapter 8, Article14 IG by means of two parliamentary decisions of identical wording. The second decision may not be taken until elections for the parliament have been held, and the newly-elected parliament has convened. At least nine months must elapse between the time when the matter was first submitted to the Parliament and the date of the election, unless the Committee on the Constitution (*Konstitutionsutskottet*) grants an exception from this provision by means of a decision taken no later than the committee stage, in which at least five-sixths of the members concur.

Regarding law which is not constitutional law, Chapter 8, Article 18 IG prescribes that no law may be amended or abrogated other than by another law. Articles 17 and 18 in the same chapter apply in a similar way with respect to amendment or abrogation of constitutional law. It is therefore impossible for the government to change a law by way of an ordinance or other statutory instruments.

The Legality Principle in the Swedish IG takes its starting-point in the general stipulation in Chapter 1 Article 1 IG: 'Public power shall be exercised under the law.'

Only the parliament (*Riksdagen*) can enact laws (Chapter 1, Article 4 IG).

The legality principle (*legalitetsprincipen*) is manifested in the Constitution (Chapter 8 IG).

Certain fields can only be regulated by an act of law, the '*sphere of mandatory law*' (Chapter 8, Article 2 IG). This category involves civil law in its entirety and provisions for defining and delimiting the courts in the administration of justice. *The power to tax* provided for in Chapter 8, Article 3 IG may only be delegated to the government in respect of customs duties.

The other level is called the *sphere of facultative law* and opens up an important area of delegated legislation. This technique is commonly used in wide areas of public law (Chapter 8, Articles 3, 5 and 7 IG). As mentioned this is of no interest concerning tax legislation, with the exception of customs duties (Chapter 8, Article 9 IG).

Thus, tax law, with the exception of import duties and tax regarding the regulation of traffic within the municipality, cannot be regulated other than by an act of law (Chapter 8, Article 3 para 2 IG), which means only by a decision of the parliament.

The legality principle concerning taxation (*den skatterättsliga legalitetsprincipen*) is manifested in the Constitution (Chapter 8, Article 3, IG and Chapter 2, Article 10 IG). The central tenet of the legality principle is that tax provisions shall be promulgated by law. It represents a long tradition concerning prerequisites for taxation. The parliament may not delegate this competence to the government or to a public authority, except when introducing regulations to supplement and/or implement statutory provisions under limited circumstances.

According to the prevailing opinion in Sweden, a reasonable consequence of the legality principle is that taxes may only be levied according to the law applicable at the time

5. Frederik Sterzel, *Författning i utveckling* (Gothenburg: Iustus förlag, 1998), at p. 48.
6. The prohibition against retroactive tax law is absolute.

of the circumstance that gave rise to the tax liability in question, which means that retroactive tax legislation is prohibited (*förbud mot retroaktiv skattelag*).[7]

Another result of the legality principle is that taxes may not be imposed through analogous application of the law (*analogiförbudet*).[8]

Finally, tax law may not be directed towards an individual tax subject, which is the principle of general law-making (*generalitetsprincipen*), a principle emanating from the preparatory works of the IG as a consequence of the legality principle.[9]

3.17.2. **Terminology**

3.17.2.1. **Distinction between retroactivity and retrospectivity**

a. In general

There is no explicit definition of retroactivity in the Swedish Constitution and its preparatory works. Nor is there any definition in any other legislative acts. However, the provision in Chapter 2, Article 10 IG could be deemed to contain an implicit definition.

In the questionnaire formal retroactivity is defined as when 'the effective entrance date of (one of more provisions of) a statute is set at a date prior to the moment on which the statute enters into force'. Chapter 2, Article 10 IG prohibits a provision from being applied to a taxable transaction occurring before the decision of the parliament. That would coincide with the definition of formal retroactivity in the questionnaire.

However, a problem for Sweden (or at least for the Swedish national report) is that there is an exception to the prohibition when the government sends a communication to the parliament. An act which later is decided by the parliament could also be applied to transactions before the decision of parliament if they occurred after the Communication was submitted. Taxation during this period means formal retroactivity, using the definition in the questionnaire, but is not a prohibited form of retroactivity according to Chapter 2, Article 10 IG. We will use the definition of retroactivity in the questionnaire, but we would like to stress that we consider that the negative effects of formal retroactivity are normally considerably reduced when the Communication Procedure is applied in a responsible way.

b. Conceptual variations

In tax law doctrine as well as in the prevailing opinion in several other legal areas, a distinction is made between *true/actual/formal retroactivity* and *false/material retroactivity*.[10] True retroactivity represents the situations which are considered retroactive because new rules are applied to transactions that have already occurred, e.g. transactions that were tax-free when they were undertaken. False retroactivity stands for the idea that new rules can have retroactive effect on past transactions. Concerning the value added tax, Melz has established a separate terminology in which he distinguishes between *retroactivity*, which signifies true retroactivity, and *retrospective effects*, signifying false retroactivity.[11]

---

7. Anders Hultqvist, *Legalitetsprincipen vid inkomstbeskattningen* (Stockholm: Juristförlaget, 1995), at p. 100.
8. Hultqvist *supra* note 6, at p. 126.
9. Hultqvist, *supra* note 6, at p. 115.
10. See for example Katarina Fast, 'Om skyddet mot retroaktiv beskattning – i belysning av regeringsformen och Europakonventionen', *Skattenytt*, akademisk årsskrift, årgång 1 2011, p. 118; Robert Påhlsson, *Konstitutionell skatterätt* (Iustus förlag, 2009), at p. 32; Wiweka Warnling-Nerep, 'Till frågan om legalitet och retroaktitivitet i svensk rätt', *Juridisk Tidskrift* 2008/2009 nr 4,; Jan Darpö, 'Miljövårdskraven i tiden (1)', *Förvaltningsrättslig Tidskrift* 2001/1-2; Jan-Mikael Bexhed, 'Retroaktiv skattelagstiftning – kan regeringsformens förbud kringgås?', *SkatteNytt* 1993, at p. 154.
11. Peter Melz, *Mervärdeskatten – rättsliga problem och grunder*, (Stockholm: Juristförlaget, 1990), at p. 233.

c. Clear distinction between retroactivity and retrospectivity

The definition of actual retroactivity is rather clear, also as it appears in the Swedish Constitution and is therefore not particularly controversial.

However, the definition of *false* retroactivity is rather vague and leaves several questions unanswered. In tax law doctrine there are many different views on what may constitute false retroactivity. At present, the concept is of no particular constitutional value, as will be further explained below.

Only the definition of true retroactivity will be used in legal practice, since it is the only form of retroactivity which enjoys constitutional protection. This can be said to be connected to the provision concerning *ex post* evaluation of law, laid down in Article 11:14 IG, which will be further elaborated on below.

The retroactivity prohibited in the Swedish Constitution (Chapter 2, Article 10 IG) covers every transaction which occurred before the date of decision by parliament (or the date of a Government Communication; see above). It is thus not permissible to apply a new rule to a transaction that occured before the date of the decision, even if it is within the same year. Although this is somewhat contentious, some taxes, such as the wealth tax, are considered to be levied according to circumstances at the end of the year and amendments are thus allowable only if they are decided before the end of the year.[12]

The distinction, is of some material relevance, but is of limited constitutional value. The question of false retroactivity might be considered in the legal interpretation of a law or a statute. Such considerations concerning de facto retroactivity may occur as well if, in a particular case, the protection of property laid down in the first protocol, Article 1 of the European Convention on Human Rights and the Fundamental Freedoms might be relevant.

3.17.2.2. **Relevance of tax period**

The constitutional provision in Chapter 2, Article 10 IG offers protection against obvious retroactivity and results in reasonable foreseeability in most cases. In a number of situations the provision is not applicable although reasons for a wider coverage are present. A short overview will be given.

For *income from employment,* tax rules may not be revised after the point in time when income has been received or is disposable. Before this point in time, e.g. after the contract is concluded and during the time the service is rendered, the tax may be increased.

This situation could be considered acceptable for practical reasons and because the employee normally has no other alternative activities with different (better) tax effects.

The liability for taxes from *income from business* often arises at the time of the delivery of goods or the rendering of service. The result is largely similar to the employment situation. Tax rules may be changed after the conclusion of the contract, production of the goods, etc.

However, the negative consequences may be more important in a business than for an employee. In a business it could be more important to factor in the effect of changes in taxation rules, because in a business environment the competition is harder, investments more extensive and more alternatives are available.

For *VAT* the situation is similar to business income. The consequences could, however, be more onerous as VAT is not a tax as a proportion of the business income, but could amount to a payment far bigger than the income. That is because VAT is considered to be shifted to the purchaser.

If a seller calculates the VAT according to the tax rate in force when a contract is concluded, there is a risk that the tax rate could be increased before delivery. If the purchaser is

12. The wealth tax was repealed in 2008.

a taxable person with right to deduction of VAT, it would normally not be a problem to invoice VAT, calculated with the new tax rate. In other cases it may not be as easy to shift the VAT increase to the purchaser without an explicit clause to that effect in the contract.

The liability for taxes concerning *income from capital* arises for capital gains at the point of time of the sale (binding contract). That means that the seller can be sure of the tax effects when he signs the contract. At the time of the capital investment – purchase of real estate, stocks, etc. – there is however no guarantee that taxation may not increase.

Anyhow this situation could be considered satisfactory. A wider protection, from the time of the investment, would result in fairly unequal results, as capital gains of equal character could be taxed considerably differently because of different dates of the original investment. It would also create a lock-in effect, as there is a tax incentive to hold on to an investment covered by favourable tax rules instead of exchanging it for a new investment which would be covered by less favourable tax rules.

3.17.2.3. **Interpretative statutes**

The Swedish legal system does not contain any (retroactive) interpretative statutes.

3.17.2.4. **Validation statutes**

The Swedish legal system does not contain any (retroactive) validation statutes.

3.17.2.5. **Comparison moment**

Like the Netherlands legal system, the date of entry into force of a law in the Swedish legal system corresponds to the date of publication of the law. All laws and ordinances are published in the Swedish Code of Statutes (*Svensk Författningssamling*, SFS), which is available in printed form and on the internet.[13]

The relevant moment of comparison in order to determine whether a law has retroactive effect is the date of the entry into force of the law.

A rather recent example is a government proposal regarding the taxation of loss-making companies in order to hinder undesired tax planning. The law entered into force on 1 January 2010, but the effective date is 5 June 2009.[14]

3.17.2.6. **Concept of retrospectivity**

a. Definition of retrospectivity
As stated above, there is a *distinction* between actual and false retroactivity. False retroactivity would be what is mentioned in the questionnaire as retrospectivity.

b. Examples of retrospectivity
There are some examples of cases which would represent retrospectivity, to which we refer below. The Council on Legislation has discussed legislative proposals concerning not only retroactivity but also retrospectivity on several occasions. This is also true for the case law concerning retrospective effects.

13. See www.riksdagen.se/Webbnav/index.aspx?nid=3910; www.lagrummet.se.
14. Prop 2009/10:47, *Ändringar i reglerna om beskattning av underskottsföretag*; Skr. 2008/09:225.

3.17.2.7. **Distinction between substantive and procedural statutes**

a. In general
According to the preparatory works of Chapter 2, Article 10 IG, the concept of retroactive legislation not only comprises substantive tax law but in some cases procedural tax law as well.

b. With respect to the impact of a statute having immediate effect
The distinction between retroactivity concerning substantive tax law and procedural rules relating to taxation has been applied by the Supreme Administrative Court.

c. Rules considered procedural rules
The application of the prohibition of retroactive tax law in Chapter 2, Article 10 IG does not embrace all procedural rules concerning taxation, but mainly refers to rules regarding evidence.

3.17.3. **Ex ante evaluation of retroactivity**

3.17.3.1. **Constitutional limitations to retroactivity of tax statutes**

The prohibition of retroactive tax legislation (*förbud mot retroaktiv skattelag*) is provided for in Chapter 2, Article10 IG as follows:

'No taxes or charges due the State may be exacted except inasmuch as this follows from provisions which were in force when the circumstance arose which occasioned the liability for the tax or charge. Should the Riksdag find that special reasons so warrant, it may however provide under an act of law that taxes or charges due the State shall be exacted even although no such act had entered into force when the aforementioned circumstance arose, provided the Government, or a committee of the Riksdag, had submitted a proposal to this effect to the Riksdag at the time concerned. A written communication from the Government to the Riksdag announcing the forthcoming introduction of such a proposal is equated with a formal proposal. The Riksdag may furthermore prescribe that exceptions shall be made to the provisions of sentence one if it considers that this is warranted on special grounds connected with war, the danger of war, or grave economic crisis.' (Article 2:10 second paragraph.)

The prohibition of retroactive tax law is provided for in the first sentence. There are some exceptions to the prohibition. An exception applies when the government or a parliamentary committee has presented a tax bill to parliament. In such a case, the tax can be levied already as of the day that the bill was presented to parliament. The same applies when the government transmits to parliament a written communication stating that a tax bill will be forthcoming.[15] This possibility has frequently been used, especially in order to hinder undesirable consequences of tax law, such as undesirable tax planning and tax evasion.

The prohibition of retroactive tax legislation was introduced in 1980. A Committee of inquiry regarding an increased protection of rights and freedoms in the IG proposed an expanded protection against retroactive legislation, which until then had only applied under criminal law.[16] The prohibition in this field of law was considered particularly important because of the onerous character of taxation for the citizens, not least with regard to the fact that a large part of the income of citizens is subject to taxation. It was also considered possible to sufficiently define retroactivity in relation to tax law.

---

15. Hultqvist, *supra* note 6.
16. SOU 1978:34, *Förstärkt skydd för fri-och rättigheter*, Betänkande av rättighetsskyddsutredningen.

The protection from retroactive tax law laid down in Chapter 2, Article 10 IG is among those rights considered to be absolute and cannot be abrogated other than by a change in the IG (see Chapter 8, Article 14 and the introduction above).

It may be concluded that Chapter 2, Article 10 IG is concerned with what we would generally call formal retroactivity or true/actual retroactivity. The prohibition only concerns retroactive tax legislation which is onerous to the taxpayer. Consequently, there is no objection to retroactivity in tax law that would be favourable to taxpayers.[17]

In order to decide whether onerous retroactivity is at hand, it is necessary to establish what kind of transaction gave rise to the tax liability and at what point in time it gives rise to a liability to pay tax, e.g. a delivery, the closure of a contract or a sale. This point in time is different for different taxes.

According to the Swedish Income Tax Act, income from employment is normally subject to tax when payment is received or at the disposal of the taxpayer,[18] and income from business is normally subject to tax when the income should be reported according to general accounting principles.[19] For value added tax, tax liability arises at the time of supply of goods or services.[20]

This means that an increase in the tax rate during the fiscal year, which would pertain to income earned before the tax law was amended, would constitute a breach of the prohibition of retroactive tax legislation. The same applies to tax deductions. If an increase in the tax rate is introduced during the fiscal year that applies only for compensations or deductions thereafter it would, however, be in line with the provision laid down in 2:10 IG.[21]

The provision might seem to cover only substantive tax rules. Nevertheless, according to the preparatory works of Chapter 2, Article 10 IG, it is also supposed to cover procedural rules to some extent, e.g. when it comes to questions relating to the burden of proof.[22]

According to Hultqvist, the provision in Chapter 2, Article 10 IG, not only comprises legislative acts but also regulations. The Swedish term '*föreskrift*' embraces both legislative acts and statutory regulations.[23]

As mentioned above, Chapter 2, Article10 IG provides that tax laws in certain cases can be promulgated according to a proposal from the Committee on Taxation of the Riksdag (*Skatteutskottet*) or a government proposal elaborated in a particular written communication. The communications may be detailed, but are seldom final enough to provide for an absolute foreseeability of the consequences of the forthcoming legislation.[24]

The provision in Chapter 2, Article 10 IG is not very detailed. It does not give any examples of situations in which this particular legislative procedure is adequate, nor does it prescribe any limits for the time period that may prevail between the communication and the bill presented to the parliament. According to the preparatory works, this procedure is mainly to be used in situations when it is considered necessary to rapidly hinder further undesirable tax planning or tax evasion. Nevertheless, the proposed rules must be in accordance with general requirements of legal security and must be considered reasonable for

17. SOU 1978:34, p 161; Påhlsson, *supra* note 9, at p. 32.
18. Income Tax Act, *Inkomstskattelagen*, ch. 10 sec. 8 and ch. 41 sec. 8.
19. Income Tax, *Inkomstskattelagen*, Act ch. 14 sec. 2.
20. Value Added Tax Act, *Mervärdesskattelagen*, ch. 4 sec. 2.
21. SOU 1978:34.
22. SOU 1978:34 at p. 160.
23. Hultqvist, *supra* note 6, at p. 142.
24. Påhlsson, 'Retroaktiv stopplagstiftning – en utvärdering av stoppskrivelseinstitutet', *Skattenytt*, Akademisk årskrift, årgång 1 2011, s 43.

the taxpayers.[25] A study by professor Påhlsson in 2011, however, reveals that the use of written communication procedures lack precision and forseeability.[26]

The procedure for written communication by the government is further regulated in the Riksdag Act (RA). According to Chapter 3, Article 6 RA the Government may communicate information to the parliament by means of a written communication. A written communication is to be delivered to the Secretariat of the Chamber (*Kammarkansliet*). It is notified by the Speaker (*Talmannen*) to a meeting of the Chamber (*Kammaren*) after copies have been distributed to the members.

This means that the government is not able to deliver such communications orally to the parliament. Furthermore, a mere mention of retroactive tax legislation in preparation of the Budget Bill is not sufficient to constitute a written communication within the meaning of Chapter 2, Article 10 IG.[27]

According to the mandatory preparation of business (*beredningstvång*) provided for in Chapter 4, Article 1 RA, government bills, written communications from the Government, submissions or reports from a parliamentary body other than a committee and private members' motions must be referred to a committee for preparation. Before a matter is referred to a committee for preparation, it is tabled at a meeting of the Chamber, unless the Chamber decides on immediate referral.

In tax matters the committee for preparation is the Committee on Taxation (*Skatteutskottet*). The committee will then prepare the written communication before it is notified to the Chamber.

The time at which the tax law elaborated according to the particular legislative procedures prescribed in Chapter 2, Article 10 IG is set will be at the date of when the written communication is delivered to the Secretariat of the Chamber and hence becomes a public official document according to Chapter 2 of the Freedom of the Press Act, or if the proposal has been elaborated by the Committee on Taxation, the point in time when the proposal is notified to the Chamber (immediate effect). As mentioned above, it is also possible that the law will enter into force at an earlier date than the day of the introduction of the proposed legislation if it is considered necessary in order to hinder continued tax planning in a certain field or tax evasion.[28]

In order for the written communications procedure or the bill presented by the Committee on Taxation to be valid, it has to be effectively communicated to the public, preferably through a press conference in connection to the introduction of the written communication or committee proposal.[29]

3.17.3.2. **Transitional policy of government**

a. Is there a transitional policy of government?

There is no particular transitional policy elaborated by the government. There are, however, situations described in the preparatory works for when transitional rules are necessary, which could be said to constitute a policy for the government.

25. Prop. 1978/79:195 p. 55, SOU 1978:34 at p. 157.
26. Påhlsson, *supra* note 22.
27. Prop. 1978/79:195, at p. 176.
28. Prop. 1978/79:195, at p. 162
29. Prop. 1978/79:195, at p. 162.

b. Transitional policy laid down in a document or an act
Transitional rules will always be enacted by law in connection with the tax act in question. No other means would be possible in respect of the legality principle. The transitional rules might further be scrutinized by the Council on Legislation.

Further information on how transitional rules ought to be applied is generally laid down in the preparatory works.

c. Transitional policy with respect to retroactivity and grandfathering
No information available.

d. Transitional policy and favourable retroactive effect
No information available.

3.17.3.3. **Ex ante control by an independent body**

a. Advisory body such as Council of State
According to Chapter 8, Articles 20-22 IG the government is obliged as a matter of principle to remit major items of draft legislation to the Council on Legislation (*Lagrådet*), which is composed of members of the Supreme Court (*Högsta Domstolen*) and the Supreme Administrative Court (*Högsta Förvaltningsdomstolen*). In brief, the consultations of the Council are to ensure conformity with the Constitution and the legal system in general, internal consistency within laws, and to safeguard the principles of the rule of law in law-making.

b. Rules to review retroactivity
The provision on the scrutiny of the Council on Legislation, laid down in Chapter 8, Article 21 IG can be said to provide for a check-list on good legislation.

The Council's scrutiny relates to
- the way in which the draft law relates to the Constitution and the legal system in general;
- the way in which the different provisions of the proposed law relate to each other;
- the way in which the proposed law relates to the requirements of the rule of law;
- whether the proposed law is so framed that the resulting law may be expected to satisfy the stated purposes of the proposed law;
- the problems likely to arise in applying the proposed law.

More precise rules concerning the composition and the working procedures of the Council on Legislation are laid down in the law (2003:333) on the Council on Legislation.[30]

The Council on Legislation has scrutinized retroactivity on several occasions in accordance with Chapter 8, Article 21, which in certain cases has led to rejection of the law by the parliament.

In 1986 the introduction of new legislation imposing a one time wealth tax on life insurance companies, certain mutual societies and pension foundations (*Lag om tillfällig förmögenhetsskatt för livförsäkringsbolag, understödsföreningar och pensionsstiftelser*), which was to be applied retroactively, was the object for the scrutiny by the Council on Legislation.[31] The Council stated that the legislation in question could not be said to constitute a breach of the prohibition in Chapter 2, Article 10 IG, even though it was considered not to be entirely compatible with the purpose of the provision.

---

30. *The Constitution of Sweden – The Fundamental Laws and the Riksdag Act*, (Stockholm: Sveriges Riksdag, 2000), at pp. 35 and 79.
31. Prop. 1986/87:61, Frederik Sterzel, *Skatt och egendomsskydd, Äganderätten – dess omfattning och begränsningar*, (Uppsala: Iustus förlag, 2009), at p. 102ff.

This practice concerning Chapter 2, Article10 IG not only concerns taxes but also fees. In 2001 the legislation concerning a concession fee for a Swedish television company, TV4, was changed retroactively since an omission had been made in the legislation concerning payments during the first six months of 2001. The law was therefore proposed to be changed so that TV4 would pay a double fee during the last six months of 2001. The Council on Legislation did not approve this and stated that the procedure constituted a flagrant attempt to circumvent the protection stipulated in Chapter 2, Article10 IG.[32]

A more recent statement concerns new legislation regarding deferral of capital gains tax due to an exchange of personal dwellings.[33] The tax credit caused by this deferral was previously free of interest. The new legislation, however, means that everyone who has been granted such a deferral, irrespective of when this happened, had to pay interest on the deferred amount by 1 January 2008. It has been debated whether this constitutes a breach of the prohibition of retroactive tax law in Chapter 2, Article 10 IG.[34] The Council on Legislation did not find the proposed legislation contrary to Chapter 2, Article 10 IG, since it would represent a general liability from the mentioned date and because taxpayers would have enough time to take relevant actions in order not to pay the interest, e.g. by restoring the deferral of taxation before 31 January 2007.[35]

In conclusion, there are no particular rules regarding tax legislation, only the general rules as stated above, which apply to all kinds of legislation. More specific guidelines are given in the preparatory works to Chapter 2, Article10 IG.

c. Rules to review grandfathering

The technique of grandfathering clauses is not, to our knowledge used in retroactive tax legislation. If this were to be used in a legislative proposal, it would most likely be referred to the Council of Legislation for scrutiny.

d. Rules to review favourable retroactivity

As mentioned above, there is no prohibition in Swedish tax law on any level that would prohibit retroactive tax legislation in favour of taxpayers.

3.17.4. Use of retroactivity in legislative practice

3.17.4.1. Legislating by press release?

There is no instrument such as legislating by press release in the Swedish legal system.

As mentioned above, the legislative practice regarding retroactive tax legislation is explained in the prohibition against retroactive tax law, Chapter 2, Article 10 IG, which prescribes a special rapid legislative procedure. This is complemented by certain rules in the Riksdag Act. Furthermore, the preparatory works to the provision in Chapter 2, Article 10 IG provide information on how the government or the Committee on Taxation will actively communicate its proposal to the public, other than by the ordinary publication procedures that are relevant for all legislation, in order to forewarn the public and especially certain groups of particulars that might be concerned, so that they can take proper actions in order

32. See for example Frederik Sterzel, *Finansmakten – i konstitutionens centrum och periferi* in: Eivind Smith and Olof Petersson, eds., *Konstitutionell demokrati*, (Stockholm: SNS Förlag, 2004), at p. 99.
33. Chapter 47 of the Income Tax Act (*Inkomstskattelagen*).
34. See e.g. Jacob Roupe, Svensk skattetidning 2008:6-7, *Skatten ('räntan) på gamla uppskov vid bostadsbyten strider mot regeringsformen.*
35. Prop. 2007/08:27 at p. 240.

to comply with the proposed rules. This is normally done through a press release or even a press conference.

The obligation to communicate a proposal concerning retroactivity concerns all retroactive tax legislation.

There is, as mentioned above, no instrument called legislating by press release. However, it is an essential part of the legislative procedure concerning retroactive tax law that the law will be communicated to the public in an effective way, which is practically always carried out through a press release.

3.17.4.2. **Retroactive effect further back than first announcement**

In certain cases the date may reach further back in the past than the date of a written communication. Most commonly this would be the case concerning issues like tax avoidance. Nonetheless, there have been other situations where retroactivity has been used to increase the public finances during an upward economic trend, such as the introduction of a new legislation in 1986 imposing a one time wealth tax on life insurance companies, certain mutual societies and pension foundations (*Lag om tillfällig förmögenhetsskatt för livsförsäkringsbolag, understödsföreningar och pensionsstiftelser*). The introduction of this law was highly controversial. It was also subject to a complaint to the European Court of Human Rights with reference to the protection of property.[36]

3.17.4.3. **Pending legal proceedings**

Retroactivity which might affect pending legal proceedings should be regulated in the transitional rules. In addition, the situation can be dealt with by the courts through the application laid down in Article 11:14 IG

It is not common for pending legal proceedings to be excluded. Normally this is not a practical problem since most pending proceedings concern circumstances that happened long before the retroactive legislation became effective. Retroactivity is generally not granted for more than perhaps a couple of months and not years. In the case that a legislative proposal is introduced as a reaction to a court judgment, it is, in principle, always after a judgment from the Supreme Administrative Court, which means that pending proceedings in the lower courts already have been going on for some time, relating to dates long before the period of retroactivity.

3.17.4.4. **Favourable retroactivity**

As mentioned above, the prohibition laid down in Chapter 2, Article 10 IG, only concerns retroactive tax legislation which is onerous to the taxpayer. Consequently, there is no objection to retroactivity in tax law, which would be favourable to taxpayers.[37] One example of this was in connection with the repeal of the inheritance and gift tax law which entered into force on 1 January 2005. At the end of December 2004, following the tragic deaths of many Swedish citizens in the tsunami disaster in South East Asia, retroactivity was granted through a special law from 17 December 2004.[38]

---

36. ECHR, appl No. 13013/87 *Wasa Liv Ömsesidigt, Försäkringsbolaget Valands Pensionsstiftelse and a goup of approximately 15 000 individuals* vs Sweden.
37. SOU 1978:34, p. 161; Påhlsson, *supra* note 9, at p. 32.
38. Prop. 2004/05:97, *Undantag från arvsskatt och gåvoskatt*.

3.17.5. Ex post evaluation of retroactivity (in case law)

3.17.5.1. Testing against the Constitution and legal principles

Sweden does not have a specific constitutional court. However, the constitutionality of the use retroactivity in legislation can be determined by the courts at any level and by other public bodies, such as the Swedish Tax Agency (*Skatteverket*) [39]

Currently the law states that if a court or other public body finds that a provision conflicts with a rule of constitutional law or other superior statute, or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision may not be applied.

In 2011, the IG was amended to provide for an expansion of the power of judicial review. Previously, in order to determine that a provision adopted by the Riksdag was unconstitutional the unconstitutionality had to be *manifest* (*uppenbarhetsrekvisitet*). However, the manifest criterion was highly criticized.[40]

3.17.5.2. Examination method

Apart from the obligation for any court or other public body to examine the constitutionality of provisions according to Chapter 11, Article 14 and Chapter 12, Article 10 IG, the constitutionality of a provision may also be scrutinized by means of re-opening of court cases that have been determined to be final and restoration of lapsed time (Chapter 14, Article 13 IG),

Re-opening of cases and restoration of lapsed time are granted by the Supreme Administrative Court or, inasmuch as this has been laid down in law, by an inferior administrative court if the case concerns a matter in respect of which the government, an administrative court or an administrative authority is the highest instance. In all other cases, re-opening of cases or restoration of lapsed time is granted by the Supreme Court or, inasmuch as this has been laid down in law, by another court of law which is not an administrative court.

Furthermore, outside the protected area in Chapter 2, Article 10 IG, there is a general principle of public law that there is a presumption of non-retroactivity. Retroactivity can only be at hand if this explicitly can be read from either the provisional regulations of a legislative act, the motives of the act in question or the purpose of the named act. The legislative action must also be in accordance with legal certainty and justice. This principle is illustrated in the case law of the Supreme Administrative Court (see e.g. RÅ 1988 ref 132, 1996 ref 57). This means for example that favourable decisions, such as permits from the public authorities, will not be able to be withdrawn because of new legislation other than in very rare circumstances (e.g. RÅ 1995 ref 10).[41]

The prohibition concerning retroactive tax law in the IG, was considered by the Supreme Court (*Högsta Domstolen*) in the year 2000.[42] The case concerned the regulations laid down in the Tax Collection Act (1997:483), *Skattebetalningslagen*, establishing a personal liability for representatives of insolvent legal persons to pay the taxes due (*ställföreträdaransvar*). These provisions had been changed in such a way that the subjective elements had been removed. According to the provisional regulations, these changes were to be applied retroactively. The Supreme Court stated that the provisional regulations were not applicable in this respect, since they gave a less favourable result than the former rules comprising

39. See Chapter 11, Article 14 and Chapter 12, Article 10 in the IG (*Lagprövning*).
40. See e.g. Joachim Nergelius, 'HD underkänner grundlagsstridig skattelag', *Juridisk Tidskrift* No. 4 1999/00, at p. 907.
41. Wiweka Warnling-Nerep, 'Till frågan om legalitet och retroaktitivitet i svensk rätt' *Juridisk Tidskrift* 2008/09 No. 4,
42. NJA 2000 s 132.

subjective elements and thus were contrary to the prohibition concerning retroactive tax legislation. This was the first the first time a law was determined to be unconstitutional.

There are several cases concerning retroactivity in relation to taxation. The case RÅ82 1:74 concerned a tax rule regarding condominiums. The Supreme Administrative Court found that the rule applicable had entered into force on 1 January 1981, and therefore could not be applied on contracts closed on or before 31 December 1980.

The case RÅ 1989 ref. 116 I concerned capital gains taxation (*kapitalvinstbeskattning*). An increase in the tax rate which had been enacted before the payment day of the sale was considered applicable. A related case RÅ 1989 ref 116 II, regarded an increase of a stamp duty (*stämpelskatt*). The increase was applicable to shares which were registered at that point in time, since the registration date gave rise to the tax liability.

The most debated case RÅ 1992 ref. 10 concerned the above-mentioned one time wealth tax on life insurance companies, certain mutual societies and pension foundations (*Lag om tillfällig förmögenhetsskatt för livförsäkringsbolag, understödsföreningar och pensionsstiftelser*). The Supreme Administrative Court came to the same conclusions as the Council on Legislation that the law was not contrary to the prohibition concerning retroactive tax law.

The legality principle is generally applied in practice. However, since the mid-eighties the courts have developed a practice, through which, they disregard how the transactions in question are labelled: a kind of substance over form method which is intended to prevent tax avoidance. This may actually be in contradiction of the legality principle laid down in the IG. This practice is controversial and raises issues of retroactivity as well as issues regarding the principle of equality.[43]

In conclusion, it has only happened once that a court determined that a tax law was retroactive and thus unconstitutional. Other cases have been concerned with the scope of the retroactivity, that it is e.g. which transactions will be hit by the retroactivity.

3.17.5.3. **Testing against Article 1 of the First Protocol ECHR**

Swedish courts are obliged to test the retroactivity of a tax statute against Article 1 of the First Protocol of the ECHR (P1-1) according to the law (1994:1219) on the European Convention on Human Rights and the Fundamental Freedoms. The ECHR has moreover a particular protection in Chapter 2, Article 19 IG which states: *No act of law or other provision may be adopted which contravenes Sweden's undertakings under the European Convention for the Protection of Human Rights and Fundamental Freedoms.* This rule mainly affects the legislator, but has appeared to be relevant, when interpreting the law on the ECHR, in cases regarding conflicts between the ECHR and Swedish laws.

No Swedish court has determined a tax law is retroactive and thus contrary to P1-1 ECHR.

3.17.5.4. **Examination method for testing against principle of legal certainty**

The Swedish courts will examine the retroactive law in relation to the constitutional provision laid down in c

Chapter 2, Article 10 IG. This provision can be seen as a consequence of the legality principle in tax law.

43. Anders Hultqvist, 'Skatteundvikande förfaranden och skatteflykt', *Svensk Skattetidning* 2005/5.

3.17.5.5. **Interpretations by courts to avoid retroactivity**

As stated in 3.17.5.2, a general principle of public law is a presumption of non-retroactivity outside the protected area of Chapter 2, Article 10 IG. Retroactivity can only be at hand if this can explicitly be read from either the provisional regulations of a legislative act, the motives of the act in question or the purpose of the named act. The legislative action must also be in accordance with legal certainty and justice. This principle, as mentioned above, is illustrated in the case law of the Supreme Administrative Court (see e.g. RÅ 1988 ref 132, 1996 ref 57). This means for example that favourable decisions, such as permits from the public authorities, will not be able to be withdrawn because of new legislation other than in very rare circumstances (e.g. RÅ 1995 ref 10).[44]

3.17.5.6. **Reasons for lack of judicial limits to retroactivity**

No information available.

3.17.6. **Retroactivity of case law**

3.17.6.1. **Temporal effect of judicial change of course**

Chapter 2, Article 10 IG prohibits application of statutory law which is retroactive. A decision by a court could overturn or change established case law. This previous case law was probably perceived by taxpayers as the standard which should continue to be applied, and a change may therefore result in an unexpected taxation which is a kind of retroactive effect.

In Swedish law there is a general principle of non-retroactivity in judgments and decisions. However this is not laid down in any legislative act. Case law decided by the Supreme Administrative Court should only be changed by a decision of the full court.[45] However, decisions in this form are rare and changes are also made in regular cases. In general, the court tries to be cautious when changing case law (see RÅ 2004 ref. 1), but if such a decision is made, no limitations exist regarding applying the new case law to other cases which are still within the legal time-limits for a decision.

The prevailing opinion is that changes in administrative practice ought to be avoided pending legislative action.[46] This is certainly the case concerning tax surcharges, which should not be levied in the case of retroactive legislation.

The practice in Swedish courts concerning taxation according to a certain substance over form doctrine (*genomsyn*) which goes beyond the underlying civil law legislation and the application of the general clause against tax avoidance laid down in the law against tax avoidance (*skatteflyktslagen*), is disputable in relation to the legality principle in tax law.[47] This application of tax law or rather creation of new rules in case law is likely to give rise to several problems not only regarding the legality principle as such, but also when it comes to the retroactive effects of such application and the principle of equality laid down in chapter 1, Article 9 IG[48]

---

44. Wiweka Warnling-Nerep, 'Till frågan om legalitet och retroaktitivitet i svensk rätt' *Juridisk Tidskrift* 2008/09 No. 4,
45. Article 5 Act of General Administrative Courts (lagen (1971:289) om allmänna förvaltningsdomstolar).
46. Robert Påhsson, 'Om likhet inför skattelag', *SkatteNytt* 2004/11, at p. 672.
47. Hultqvist has therefore suggested that the promulgation of retroactive tax laws according to the written communication procedure prescribed in the 2:10 IG, would be more preferable with respect to the legality principle than the use of case law doctrine in the field, Hultqvist, *supra* note 37.
48. Anders Hultqvist, 'En tätningskommission i stället för genomsyn och skatteflyktslag', *Svensk Skattetidning* 2007/4.

3.17.7. **Views in the literature**

3.17.7.1. **Opinions regarding retroactivity**

The literature regarding the prohibition on retroactive legislation is rather scarce in both tax law doctrine and public law doctrine. In a monograph from 1975 Hagstedt has discussed the problem of retroactive tax legislation, but he was referring to the situation before the IG was introduced.[49] Since then, a few papers and chapters in different doctrinal works have dealt with the question of retroactivity.[50] Hultqvist viewed the prohibition as a part of the legality principle in tax law in his thesis of 1995.[51] Professor Påhlsson at the Gothenburg School of Economics has examined the subject on several occasions. In his thesis he looked at retroactivity concerning public advice given by the Swedish Tax Agency. He points out how important it is for the Tax Agency to consider retroactivity in the making of its public advice statements. He has also dealt with the issue in his 2006 work on the principle of equality in tax law, where he discusses retroactivity in relation to the principle of equality.[52] Furthermore, he has published the first text book on constitutional tax law in editions from 2009 and 2011, where he examines the protection against retroactive tax legislation.[53] Most importantly he published a study in 2011 concerning the prohibition of retroactive tax legislation. The prime focus of this study is on the written communication procedure, its efficiency, and compatibility with the rule of law. He has come to the conclusion that the constitutional provision, although in accordance with European law, needs to be reformed in order to live up to the requirements of the rule of law.[54] Professor Stefan Olsson, Karlstad University has dealt with retroactivity in the field of excise duties.[55] Katarina Fast, doctoral candidate in public law at Stockholm University, is currently working on a thesis concerning taxation and protection of property, where the issue of retroactive tax law is a part of the project. She published a study in 2011 on the protection against retroactive tax law in the IG and the ECHR, where she concludes that the constitutional protection against retroactive tax law is weak, despite its characterisation as an absolute right in the IG. She concludes that reform is needed.[56] There is also a current project on retroactivity in public law being carried out by Professor Wiweka Warnling Nerep, Stockholm University. Furthermore, the Faculty of Law at Stockholm University has initiated a project on tax legislation that concerns questions of retroactivity.[57]

3.17.7.2. **Debate on law and economics view on transitional law**

The law and economics view has not been particularly concerned with retroactivity or retrospective effects although the Swedish economists engaged in the field of law and economics recommend strong institutions and legal certainty as important factors for economic

49. Jan Anders Hagstedt, *Retroaktiv skattelag* (Stockholm: P.A. Nordtedt & Söners Förlag, 1975).
50. See e.g. Påhlsson, *supra* note 9, at p. 32; Stefan Olsson, *Punktskatter – rättslig reglering i svenskt och europeiskt perspektiv*, (Uppsala: Iustus Förlag, 2001), at p. 208; Jan-Mikael Bexhed, 'Retroaktiv skattelagstiftning – kan regeringsformens förbud kringgås?', *SkatteNytt* 1993 at p. 154; Melz, *supra* note 10, at p. 233.
51. Hultqvist, *supra* note 6.
52. Påhlsson, *supra*, note 43.
53. Påhlsson, *supra*, note 9.
54. Påhlsson, *supra*, note 22.
55. Olsson, *supra*, note 47.
56. Fast, *supra*, note. 9.
57. www.skattelagstiftningsprojektet.se.

growth. They have been inspired by American economists such as James Buchanan, Ronald Coase and Douglass North.[58]

There has been no particular debate concerning the law and economics view on retroactive tax legislation.

58. See e.g. Daniel Waldenström,, 'Privat äganderätt och ekonomisk tillväxt', in: Niclas Berggren and Nils Karlson, eds., *Äganderättens konsekvenser och grunder*, (Stockholm: Ratio, 2005).

3.18. Turkey

Billur Yalti

3.18.1. Terminology

3.18.1.1. Distinction between 'retroactivity' and 'retrospectivity'

Neither 'retroactivity' nor 'retrospectivity' is explicitly provided or defined under the tax provisions of the Turkish Constitution (TC)[1] or any other tax law. The TC only provides a prohibition of the retroactivity of unfavourable criminal laws, stating that 'no one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed; no one shall be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed. The provisions of the above paragraph also apply to the statute of limitations on offences and penalties and on the results of conviction' (Article 38, TC). Non-retroactivity of unfavourable criminal laws is also regulated in the Turkish Criminal Code[2]. Accordingly, the Turkish Criminal Code provides in Article 7 that favourable criminal provisions have to be applied to criminal actions committed at the time of a previous law. With respect to private law, the Law on the Application of Turkish Civil Code[3] also provides explicitly in Article 1 and 2 for the non-retroactivity of the provisions of the new Turkish Civil Code[4], except the provisions related to public order and general morality.

In the Turkish legal discourse on taxation, the term 'retroactivity' (geriye yurume) is used to define the application of laws to past events. However, a distinction has been established between 'real retroactivity' (gercek geriye yurume) (retroactivity) and 'unreal retro-

1. Official Gazette of 9.11.1982, No. 17863 (2nd issue.). Official English translation published in the website of the Turkish Grand National Assembly, www.tbmm.gov.tr/english/english.htm
2. Turk Ceza Kanunu, No. 5237 (Official Gazette of 12 October 2004, No.25611).
3. Turk Medeni Kanununun Yururluğu ve Uygulama Sekli Hakkinda Kanun, No. 4722 (Official Gazette of 8 December 2001, No. 24607).
4. Turk Medeni Kanunu, No. 4721 (Official Gazette of 8 December 2001, No.24607).

activity' (gercek olmayan geriye yurume) (retrospectivity) by the tax literature[5]. The Turkish Constitutional Court (TCC) follows this distinction in its jurisprudence[6].

3.18.1.2. **Relevance of tax period**

In the Turkish legal discourse on taxation, the criterion for the distinction between real and unreal retroactivity is the 'taxable event'.

Unreal retroactivity (retrospectivity) refers to the situations in which a new provision is introduced before the completion of a taxable event. In such cases, even though the taxable event commenced, the final legal effect of it has not occurred. Thus, the actual tax obligation has not arisen at the time of the introduction of the new law. Since the new law applies from the beginning of the current year but is introduced prior to the completion of the tax period, this kind of law is characterized as 'unreal retroactive' and considered in principle to be justifiable in terms of the rule of law. For example, Law No. 4444[7] entered into force on 11 August 1999, and stipulated that the individual income tax rates enumerated under the tariff was increased 5% as from 1 January 1999.

In cases where the new law is introduced after the completion of the taxable event, such a law is regarded as 'real retroactivity' (retroactivity) and considered in principle to be unjustifiable. For example, Law No. 1137[8] entered into force on 31 March 1969, and stipulated that the corporate income tax rate is increased from 20% to 25% as from 1 January 1968. In this case, the new law applied to the previous year.

With respect to the retroactivity of tax laws, a distinction between 'economic retroactivity' and 'legal retroactivity' has also been suggested in the literature[9]. Accordingly, the term 'economic retroactivity' stipulates new additional taxes codified under a different name, such as 'Economic Balance Tax' introduced on 7 May 1994[10] as a one-off tax applied at 10% on the income derived in 1993. The so-called tax was applied in addition to the individual income tax and corporate income tax in the form of a 'new' tax. Under the suggested distinction, legal retroactivity means any retroactive application of a law that amends any provisions of an existing tax law[11]. However, such a distinction does not introduce new or further criteria to replace 'the completion of the taxable event' used to distinguish between retrospective or retroactive applications.

---

5. Nami Cagan, *Vergilendirme Yetkisi* (Istanbul: Kazanci Hukuk Yayinlari, 1982), at p.179 et seq.; M. Oncel, A. Kumrulu andN. Cagan, *Vergi Hukuku*, 14th edition (Ankara: Turhan Kitabevi, 2006), at pp. 47-48. This distinction has also been followed by other authors such as, Selim Kaneti, *Vergi Hukuku*, 2nd edition (Istanbul: Filiz Kitapevi, 1989), at pp.45-46; Gulsen Gunes, *Verginin Yasalligi Ilkesi*, 2nd edition (Istanbul: 12 Levha Yayincilik, 2008), at p.137; Billur Yalti and Selcuk Ozgenc, *Vergi Hukuku Pratik Calisma El Kitabi*, 2nd edition (Istanbul: Beta Yayinlari, 2007), at p.56; Yusuf Karakoc, *Genel Vergi Hukuku*, 4th edition (Ankara: Yetkin Yayinlari, 2007), at p.141; A. Volkan Ozguven, *Turk Vergi Hukukunda Geriye Yurumezlik İlkesi* (Ankara: Maliye ve Hukuk Yayinlari, 2007), at p.24.
6. Constitutional Court, E.1989/6, K.1989/42, 7.11.1989 (Official Gazette of 6 April 1990, No.20484); Constitutional Court, E.2001/36, K.2003/3, 16.1.2003 (Official Gazette of 21 November 2003, No. 25296); Constitutional Court, E.2001/392, K.2003/60, 4.6.2003 (Official Gazette of 18 December 2003, No.25320); Constitutional Court, E.2001/34, K.2003/2, 14.1.2003 (Official Gazette of 19 November 2003, No.25294); Constitutional Court, E.2004/14, K.2004/84, 23.6.2004 (Official Gazette of 22 November 2005, No. 25974); Constitutional Court, E.1995/6, K.1995/29, 6.7.1995 (Official Gazette of 10 February 1996, No.22550); Constitutional Court, E.1994/85, K.1995/32, 13.7.1995 (Official Gazette of 28 September 1996, No.22771); Constitutional Court, E. 1999/51, K.2001/63, 28.3.2001 (Official Gazette of 29 March 2002, No. 24710).
7. Law No. 4444 (Official Gazette of 14 August 1999, No. 23786).
8. Law No.1137 (Official Gazette of 31 March 1969, No. 13162).
9. Ozguven, *supra* note 5, at pp.88-89.
10. Law No. 3986 (Official Gazette of 7 May 1994, No.21927).
11. Ozguven, *supra* note 5, at p. 89.

3.18.1.3. **Interpretative statutes**

In the Turkish legal order parliamentary interpretation is not accepted[12]. Under the old Constitution of 1924, the parliament was authorized to interpret the statutes enacted. However, in the Constitution of 1961 and also in the current Constitution of 1982, pursuant to the principle of separation of powers, this authority has been repealed. Thus, an interpretative statute by which the parliament clarifies the meaning of a previous statute and explains what has to be understood by its provisions is not a valid instrument.

3.18.1.4. **Validation statutes**

The Turkish legal order does not recognize the phenomenon of validation statutes which retroactively eliminate previous individual judicial decisions that deviate from the legal practice or the view of the tax authorities. Under Article 138 of the TC, it is provided that 'the legislative and executive organs and the administration shall comply with the court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution'. Thus, the parliament may not overrule or eliminate an individual judgment given by a court in an individual case. However, parliament may enact generally applicable laws deviating from the jurisprudence, in which case the timing issues arising from the effective dates of such laws are subject to consideration under the distinction between real and unreal retroactivity.

3.18.1.5. **Comparison moment**

In the Turkish legal order no conceptual distinction is made between the date of entry into force and the effective date of a statute. Although the publication of laws in the Official Gazette is a prerequisite for the application of its provisions, the legislator is authorized to set the effective date (*meriyet-yururluk*)[13]. The effective date of a statute is usually set as the date of publication, however deviations may arise as a prior or a subsequent date. In rare cases, if the effective date has not been provided for in the text of the statute, the provisions are applicable 45 days later than the publication date[14].

For example, regarding the Value Added Tax Law (VATL) published in the OG of 25 November 1984[15], the provisions authorizing the Ministry of Finance entered into force on that date, whereas the remaining provisions entered into force on 1 January 1985. The legislator, deviating from the date of publication, may set the effective date of one or more provisions of a statute as a prior date granting the statute retroactive or retrospective effect. For example, the Corporate Income Tax Law (CITL), published in the OG of 21 June 2006[16], provided that certain provisions are applicable as of the publication date, whereas most of its provisions effectively (and retrospectively) applied from 1 January 2006. However, the transfer pricing provisions of the CITL were effectively applicable from 1 January 2007.

For the purposes of retroactivity, the comparison moment is the effective date of a statute. In addition, in cases where the legislator introduces one-off additional taxes based on the previous year's income tax base, or on the previous year's lump-sum tax amounts (such as the motor vehicle tax), the moment of the publication in the OG is considered for

---

12. Oncel, Kumrulu and Cagan, *supra* note 5, at p. 18.
13. Adnan Guriz, *Hukuk Baslangici*, 4th edition (Ankara: Siyasal Kitabevi, 1994), at p.114.
14. Kanunlarin ve Nizamnamelerin Sureti Nesir ve İlani ve Meriyet Tarihi Hakkinda Kanun, No.1322 (Official Gazette of 4 June 1928, No.904).
15. Katma Deger Vergisi Kanunu, No.3065 (Official Gazette of 25 November 1984, No. 18563).
16. Kurumlar Vergisi Kanunu, No. 5520 (Official Gazette of 21 June 2006, No. 26205).

the comparison, despite the fact that the publication date and the effective date coincide, the material effect of the law is retroactive.

3.18.1.6. **Concept of retrospectivity**

As mentioned above, retrospectivity (unreal retroactivity) is defined as the introduction of a new tax provision which negatively affects the tax obligations of the taxpayer after the commencement of but prior to the completion of the taxable event[17]. Under the distinction between real and unreal retroactivity, a statute which enters into force on 1 January 2010, and stipulates that a certain tax exemption is repealed as from that date without grandfathering accrued but unrealized gains would be regarded as an example of real retroactivity if the taxable event is defined by the law as the 'accrual' of a certain income type (such as business income). In such a case, a vested right exists for the taxpayer for the exemption as of 31 December 2009 and the application of such a law would be unjustifiably retroactive. However, if the taxable event is described by the law as the 'collection' of a certain income (such as professional income or rent received from immovable property), then such a law would neither be considered retroactive nor retrospective, since the act of collection would be realized after the law entered into force (at the beginning of the tax period). For the latter case, assuming that the law repealing the exemption entered into force on 4 March 2010 without a grandfathering clause, it would be an unreal retroactive (retrospective) application, since the taxable period for the year 2010 has not been completed.

The investment allowance, which was one of the exempt items in calculating the taxable income, and was abolished[18] beginning from 1 January 2006 by a law published in the OG of 8 April 2006 without grandfathering clause for the period of 1 January 2006 and 8 April 8 2006 is a recent example of the retroactivity discussions in Turkish tax law[19]. Under a transitional provision, taxpayers were allowed to benefit from the allowance for three years for their investments realized as of 31 December 2005. However, no transitional provisions were concerned on the investment expenditures realized between 1 January 2006 and 8 April 2006. Some practitioners argued that the law was abolished after the completion date of the advance tax payment period between 1 January 2006 and 31 March 2006 and the law was retroactively applied contrary to the principle of protection of vested rights[20]. However, some practitioners advocated another view, which in the opinion of the author of this report was correct, that the law had only retrospective effect[21]. Since the advance tax payment is a collection procedure in nature having temporary consequences and the tax position of the taxpayer is determined finally and definitively at the end of the year, the abolition of the exemption for 2006 income would only be retrospective (unreal retroactivity). Nevertheless, the TCC found the relevant provision to be retroactive and annulled[22] the statute on grounds of the principle of the rule of law and forseeability.

---

17. Oncel, Kumrulu and Cagan, *supra* note 5, at p. 47.
18. Law No. 5479 (Official Gazette of 8 April 2006, No. 26133).
19. The investment allowance amount was calculated by the application of investment allowance rate on the total amount of fixed assets purchased or constructed. For example, if the cost price of a fixed asset was 100 units, and if the rate of the investment allowance was 40% of the fixed asset, the first 40 units of profits resulting from the investment were tax exempt. The investment allowance was generally spread over several years. If the profits were not sufficient to cover the whole investment allowance, the excess is revalued by the wholesale price index determined by the State Statistics Institute in the following years.
20. Bumin Dogrusöz, 'Yatirim İndiriminde Hak Kullanimi', *Referans Gazetesi*, 7.5.2009.
21. Tahir Erdem, 'Yatirim Indirimi İstisnasinin Yururlukten Kaldirilmasinin Hukuki Analizi', *Mali Pusula*, No.22, October 2006, at p.108; Ersin Nazali, 'Vergi Hukukunda Kazanilmis Hak Kavrami ve 01.01.2006-08.04.2006 Tarihleri Arasinda Yapilan Yatirim İndirimi Harcamalarinin Durumu', *Vergi Dunyasi*, No.308, April 2007, s.142.
22. Constitutional Court, E.2006/95, K.2009/144, 15.10.2009 (Official Journal of 8 January 2010, No.27456).

3.18.1.7. **Distinction between substantive and procedural statutes**

In Turkish legal discourse, with respect to the impact of a statute having immediate effect, a distinction has been made between substantive statutes and procedural statutes. The procedural rules on civil law[23] and criminal law[24] have 'immediate effect' on pending proceedings[25]. Retrospective application of procedural tax laws is accepted by the TCC[26] and the literature[27]. Procedural rules are technical and formal rules regulating the mode of application without having any impact on the substance of taxes within the meaning of an increase in the tax burden. The essential character rather than the designation is decisive for a rule to be characterized as a procedural one. For example, criminal and administrative penalties are regulated under the Tax Procedure Law (TPL)[28]; however, they are not characterized as rules on procedure. Statute of limitation rules, provisions relating to documentation, or evidence and the burden of proof are considered to be procedural rules and subject to the principle of immediate effect.

The amendments on the statute of limitations applicable from 1 January 1961 increasing the period of statute of limitations from three years to five years have been discussed by the Supreme Administrative Court (SAC) in respect of retroactivity. The SAC stated that the new law had immediate effect for taxes for which the previous three-year period had not been completed, whereas the new provisions could not be applicable to taxes which had been subject to the statute of limitations before the introduction of the new law. For the latter cases, the taxpayers had been entitled to benefit from vested rights and an opposite application would unacceptably lead to real retroactivity[29].

The discussion whether the provisions on interest on late payments inserted in the TPL on 1 January 1986 were procedural or substantive can be a good example of the Turkish approach on the procedural rules. The legal issue was whether the new provision had immediate effect and also covered the tax assessments for the tax periods completed prior to the introduction of the new law. In the literature it was considered that the new late payment interest provision was a procedural rule on the collection of taxes subject to immediate effect[30], whereas the Supreme Administrative Court characterized it as a substantive rule increasing the financial obligations of a taxpayer and could not be retroactively applied for previous tax periods completed before 1 January 1986[31].

---

23. Article 578 of the Law No. 1086 on the Procedural Rules Applicable to Civil Proceedings (Official Gazette of 2, 3, 4 July 1927, Nos. 622, 623, 624).
24. Nur Centel and Hamide Zafer, *Ceza Muhakemesi Hukuku*, 4th edition (Istanbul: Beta Yayinlari, 2006), at p.51 et seq.
25. Guriz, *supra* note 13, at pp.116-117; Abdullah Dinckol, *Hukuka Giris* (Istanbul: Alkim Yayinlari, 2000), at pp. 128-129.
26. Constitutional Court, E.1989/6, K.1989/42, 7.11.1989 (Official Gazette of 6 April 1990, No.20484).
27. Akif Erginay, *Vergi Hukuku* (Ankara: Savas Yayinlari, 1990), at p.39; Kamil Mutluer, *Vergi Genel Hukuku* (Istanbul: İstanbul Bilgi Universitesi Yayinlari, 2006), at p.51; Ozguven, *supra* note 5, at p.127, et.seq.
28. Vergi Usul Kanunu, No.213 (Official Gazette of 10 January 1961, No.10703).
29. Supreme Administrative Court, 4th Chamber, E.1972/5771, K.1973/4033, 18.9.1973 (Oncel, Kumrulu and Cagan, *supra* note 5, p.141, footnote 49).
30. Ahmet Kumrulu, 'Vergi Davalarında Uygulanan Gecikme Faizi Hakkinda Dusunceler', *Ankara Universitesi Hukuk Fakultesi Dergisi*, Vol.XL, Nos.1-4, 1988, at p. 248.
31. Supreme Administrative Court, Grand Chamber Unification Decision E.1988/5, K.1989/3, 3 July 1989, (Official website of the Supreme Administrative Court: www.danistay.gov.tr).

3.18.2. Ex ante evaluation of retroactivity

3.18.2.1. Constitutional limitations to retroactivity of tax statutes

Under the Turkish TC of 1982, there is no explicit limitation for the retroactivity of tax statutes. The previous TC of 1961 did not provide an explicit provision as such either. However, during the discussions in the constituent assembly on the draft TC of 1961, some members argued for the introduction of an explicit provision concerning non-retroactivity of tax statutes which was confronted by the majority of members with the argument that the state might need to apply retroactive tax laws in extraordinary financial conditions[32].

The TC of 1982 only provides a provision on the non-retroactivity of unfavourable criminal laws that 'no one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed; no one shall be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed. …' (Article 38, TC). This provision is an explicit limitation to the retroactivity of unfavourable criminal laws also covering criminal sanctions regulated to punish the fraudulent actions of taxpayers, as well as tax penalties applied as monetary administrative sanctions.

Although there is no explicit provision for the limitation of retroactivity of substantive tax statutes, such a limitation derives from the principle of the rule of law that is laid down in Article 2 of the Constitution, which defines the Turkish Republic as 'a democratic, secular and social state governed by the rule of law'. The TCC considers 'the principle of non-retroactivity of laws, which naturally covers also the tax statutes, as a general principle of law deriving from the principle of the rule of law and the principle of legal certainty' and states that 'despite the fact that the principle of non-retroactivity is not explicitly provided in the Constitution, the Court considers itself authorized to evaluate the constitutionality of a law under the principle of the rule of law and the principle of proportionality'[33].

Besides the above approach, it is argued in the literature that the principle of non-retroactivity may also be derived from the principle of legality[34] whereby it is explicitly provided for in Article 73(3) of the TC that 'taxes, fees, duties, and other such financial impositions shall be imposed, amended, or revoked by law'. Accordingly, the concept of 'law' implies the qualitative requirements, one of which is the *'foreseeability'*[35] of the applicable legal provisions. Thus, the concept of foreseeability also constitutes a subordinating element also covering the timing issues of a law, and requires that a law be applicable to events occurring following its enactment within the context of legal certainty[36].

---

32. Erginay, *supra* note 27, at pp. 42-43. See also Nami Cagan, 'Anayasa Tasarısında Vergi Ve Benzeri Mali Yükümlülükler', *Vergi Dunyasi*, No. 13, September 1982.
33. Constitutional Court, E.1989/6, K.1989/42, 7.11.1989 (Official Gazette of 6 April 1990, No.20484).
34. Yalti and Ozgenc, *supra* note 5, at p.54; see also Nihal Saban, *Vergi Hukuku*, 5th edition, (Istanbul: Beta Yayınlari, 2009), at p. 26.
35. While explaining the meaning of the concept 'in accordance with the law' provided in the European Convention of Human Rights (ECHR), the European Court of Human Rights (ECrtHR) states, 'the expression 'in accordance with the law', within the meaning of Article 8 § 2 (Article 8-2), requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, *who must moreover be able to foresee its consequences for him*, and compatible with the rule of law', *Kruslin v. French*, Application No. 7/1989, 27 March 1990, para.27; For an example of case law regarding tax law, see also *Spacek, s.r.o. v. The Czech Republic*, Application no. 26449/95, 9 November 1999, para. 54, www.echr.coe.int/ECHR/EN/Header/Case Law/HUDOC/HUDOC+database).
36. Yalti and Ozgenc, *supra* note 5, at pp.54-55; Billur Yalti, *Vergi Yukumlusunun Haklari* (İstanbul: Beta Yayınları, 2006), at p.64 et seq.

3.18.2.2. **Transitional policy of the government**

The Turkish government has no transitional policy in general or in the field of tax statues.

3.18.2.3. **Ex ante control by an independent body**

In the Turkish legal order, although the Constitutional Court exists, no ex ante advisory procedure is applied for legislative proposals. Article 155 of the TC, while describing the functions of the Supreme Administrative Court, provides that an opinion must be given within two months of time on draft legislation submitted by the Prime Minister and the Council of Ministers. However, submission of draft legislation to the SAC is not obligatory and no practice as such has been exercised with respect to tax legislation.

3.18.3. **Use of retroactivity in legislative practice**

3.18.3.1. **Legislating by press release**

In Turkey the instrument of legislating by press release is not used. However, sometimes the government may inform the public by press release on planned tax amendments without clarifying whether such an amendment will be retroactively applied or not. Such announcements have been made with respect to tax policy changes, or measures with which economic or financial results were expected or a substantial tax reform was envisaged. Such information releases have (or had) no effect on the retroactivity discussions or on the jurisprudence of the TCC. However, in the literature it has been asserted that in cases where taxpayers may predict and know a tax amendment to be retroactive by way of a press release, such a press release can be regarded as a justification for retroactivity[37].

3.18.3.2. **Legislative practice**

In Turkish tax history, many retroactive applications have been carried out by way of increasing the applicable tax rates or introducing new one-off additional taxes based on the income of previous years. The retroactive legislation has been justified by the legislator by the tax policies concerning inflation and economic crisis, budgetary deficits, natural disasters or for technical reasons[38].

3.18.3.3. **Pending legal proceedings**

No specific information on the effects of retroactive provisions on pending cases has been determined by the author of this report.

3.18.3.4. **Favourable retroactivity**

a. Favourable retroactivity in respect of taxes

The TCC states that the tax statutes on tax obligations which are favourable to taxpayers may be retroactively applied, provided that the equality principle is not infringed[39]. According to some scholars, retroactivity of favourable tax laws is acceptable within the limitation of

37. Oncel, Kumrulu and Cagan, *supra* note 5, at p.47.
38. Oncel, Kumrulu and Cagan, *supra* note 5, at p. 48; Ozguven, *supra* note 5, at p.91 et seq.
39. Constitutional Court, E.1989/6, K.1989/42, 7.11.1989 (Official Gazette of 6 April 1990, No.20484).

equality principle since there is no provision in the TC preventing to do so[40], whereas some scholars strongly oppose this view on grounds that such retroactive application would be contrary to the equality principle and fairness[41], and that would infringe the legality principle[42] and be abused by political considerations[43].

In Turkish tax practice, such a favourable retroactive application was carried out with respect to the reduction of tax rates of the Inheritance and Transfer Tax on 15 August 1959. The new provisions were applied also to taxable events occurring between 1957-1959 and resulting in tax refunds. The purpose of this exercise was restitution in integrum to the tax regime applied prior to 1957[44]. A similar application was introduced by Law 5904[45] that entered into force on 3 July 2009, which provided income tax exemption for special indemnities derived by employees before that date.

Another example of favourable retroactivity is the provision introduced on 26 November 1999 by Law 4481 on Earthquake Taxes[46] which provided a tax exemption to the heirs for their inherited assets from the death of persons in the earthquakes that occurred on 17 August 1999 and 12 November 1999.

b. Favourable retroactivity in respect of criminal sanctions and tax penalties

The TC provides a prohibition of the retroactivity of unfavourable criminal laws which also covers the criminal sanctions regarding taxpayers, as well as the tax penalties applied as monetary administrative sanctions. Accordingly, the TC requires the retroactive application of a favourable penal provision to the previously committed crimes.

For example, criminal sanctions applied upon tax fraud committed by using fake invoices in the form of imprisonment between three years and five years were reduced by Law 4369[47] to between 18 months and 3, years respectively. A transitional provision concerning the application of the favourable rule for pending cases, however, excluded the cases where convictions had been delivered by the courts. The TCC surprisingly cancelled the provision on grounds of equality without discussing the principle of retroactivity of favourable sanctions[48].

Another example concerns the Tax Procedure Law No.213, which entered into force on 1 January 1961. A transitional provision regulated that favourable administrative tax fines (as well as the sanctions) provided for by the law should be applicable to the offences committed prior the introduction of the law. The law was applied to pending cases and only taxpayers who had already paid their tax fines at the material time did not benefit from this application[49].

40. Oncel, Kumrulu and Cagan, *supra* note 5, at p. 50.
41. Kenan Bulutoglu, *Turk Vergi Sistemi*, 6th ed.(Istanbul: Fakulteler Matbaasi, 1978), at p.26; Ozguven, *supra* note 5, at p.116, footnote 384.
42. Ozguven, *supra* note 5, at pp.114-116.
43. Gunes, *supra* note 5, at p.139.
44. Bulutoglu, *supra* note 41, at p. 26.
45. Law No 5904 (Official Gazette of 3 July 2009, No.27277).
46. Law No 4481 (Official Gazette of 26 November 1999, No. 23888).
47. Law No. 4369 (Official Gazette of 29 July 1998, No.23417).
48. Constitutional Court, E.2000/21; K. 2000/16, 6.7.2000 (Official Gazette of 29 November 2000, No.24245)
49. Erginay, *supra* note 27, p.42.

3.18.4. **Ex post evaluation of retroactivity (in case law)**

3.18.4.1. **Testing against the Constitution and legal principles**

In the Turkish legal system it is possible for the Constitutional Court to test the retroactivity of a tax statute for compatibility with the Constitution[50]. While explaining its fundamental approach to the retroactivity issues, the TCC states: '*Under the principle of non-retroactivity, the statutes must be applied to subsequent legal actions, events or transactions that are occurred after their enactment. Exceptional cases may appear which are accepted as necessary for public interest or public order or for the protection of vested rights or for the improvement of financial rights*'[51].

3.18.4.2. **Examination method**

In the jurisprudence of the TCC, there have been few cases where the retroactive application of the tax laws has been tested in terms of compatibility with the Constitution, most of which has found to be compatible.

A group of cases concerns statutes increasing the tax burden for previous events. The first case was related to the introduction of lump-sum taxation of individual taxpayers determined by indicators of living standards resulting in minimum tax payments even in loss cases. The statute which was introduced as of 3 December 1988 applied from 1 January 1988. The TCC stated in its decision that the statutes increasing the tax burden after the *completion of the taxable event* should be tested against the principle of non-retroactivity; however, it found the statute to be unreal retroactivity (retrospective) on grounds that the statute entered into force within the same year prior to the completion of the taxable event, and that the provisions covered the indicators of living standards valid for 1988. The TCC referred to the *purpose of the law* which was the introduction of a safety measure for the payment of taxes and the prevention of tax loss, and found the statute to be in accordance with the *public interest*. Referring also to the *proportionality* principle, the TCC considered that the remaining time period before the completion of the taxable period was reasonable and long enough to be informed and be prepared for the application of the provision. Consequently, the statute was found to be compatible with the principle of legal certainty[52].

---

50. a) According to Article 148 of the TC, 'the Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, decrees having the force of law, and the Rules of Procedure of the Turkish Grand National Assembly. Constitutional amendments shall be examined and verified only with regard to their form. …'.
    b) A case may be brought before the TTC by annulment action or by contention of unconstitutionality before other courts. Accordingly, 'the President of the Republic, parliamentary groups of the party in power and of the main opposition party and a minimum of one-fifth of the total number of members of the Turkish Grand National Assembly shall have the right to apply for annulment action to the Constitutional Court, based on the assertion of the unconstitutionality of laws in form and in substance, of decrees having the force of law, of Rules of Procedure of the Turkish Grand National Assembly or of specific articles or provisions thereof' (Article150 TC). According to the contention procedure, 'if a court which is trying a case, finds that the law or the decree having the force of law to be applied is unconstitutional, or if it is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it shall postpone the consideration of the case until the Constitutional Court decides on the issue. … The Constitutional Court shall decide on the matter and make public its judgment within five months of receiving the contention. If no decision is reached within this period, the trial court shall conclude the case under existing legal provisions. However, if the decision on the merits of the case becomes final, the trial court is obliged to comply with it' (Article 152 TC).
51. Constitutional Court E.2005/128, K.2008/54, 7.2.2008 (Official Gazette of 1 July 2008, No.26923).
52. Constitutional Court E.1989/6, K.1989/42, 7.11.1989 (Official Gazette of 6 April 1990, No.20484).

The TCC reaffirmed its jurisprudence in a case on a similar statute that was introduced on 30 November 2000 establishing the application of living standards from 1 January 2000[53].

In another case, the TCC tested the statute that entered into force on 11 August 1999, and held that the individual income tax rates enumerated under the tariff were increased 5% as from 1 January 1999 and found it to be retrospective under the criteria on the completion of the taxable event, and further found the increase in *tax burden* to be *proportional and fair*[54]. The last case was on motor vehicle tax that was introduced on 2 January 2004 and applied from 1 January 2004. The statute increased the lump-sum tax amounts which automatically accrued on 1 January 2004 and was payable within two instalments in January and July, 2004. According to the TCC, the statute entered into force prior to the *payment dates* and resulted only in justifiable retrospectivity[55].

The other group of cases is related to the statutes introducing one-off additional taxes. In the first case, the TCC considered the compatibility of economic balance tax which was introduced on 7 May 1994 and which was applied at 10% in addition to the individual income tax and corporate income tax to the income derived in 1993. The TCC, reaffirming its jurisprudence that a statute is retroactive if applied after the taxable event's completion, held that the economic balance tax was a new tax rather than an additional one, introduced within the sovereign rights of the state for the purposes of *encountering the effects of financial crisis,* and that the taxable event for this new tax was the submission of income and corporate tax returns declared to the tax offices in 1994. The TCC concluded that the statute was compatible with the principle of the rule of law[56]. In the second case considered, the statute introducing a Net Asset Tax on 7 May 1994 applicable to the existing assets as of 31 December 1993 or to the turnover of that year, depending on which would raise the higher tax. The TCC described the net asset tax applied on the assets held by the taxpayers as a new wealth tax rather than an additional or an extraordinary tax and did not annul the statute. However, the TCC, without reasoning in respect of retroactivity and referring to the ability of taxpayers to pay taxes, held in general terms that the net asset tax calculated on the turnover of 1993 was incompatible with the principle of the rule of law[57].

A similar decision by the TCC was on a statute published on 26 November 1999 introducing one-off additional earthquake taxes, such as additional income and corporate income tax based on the income derived in 1998, additional real estate tax and additional motor vehicle tax paid in 1999. The TCC held that such retroactive applications were justified by the *public interest* concerns because of the *social and economic conditions* after the earthquake, and by the need to eliminate economic deprivation and to maintain social solidarity[58].

Finally, a recent case on a statute abolishing the investment allowance with a restricted grandfathering clause is another example for the TCC's jurisprudence. The investment allowance[59] applying as an exempt item in calculating the taxable income was abolished[60] beginning from 1 January 2006 by a law published in the OG of 8 April 2006. Under a transitional provision, taxpayers were allowed to benefit from the allowance for three years for their investments realized as of 31 December 2005. The TCC held the transitional provision which was restricting the application of the exemption within a three-year period

53. Constitutional Court E.2001/36, K.2003/3, 16.1.2003 (Official Gazette of 21 November 2003, No. 25296); Constitutional Court E.2001/392, K.2003/60, 4.6.2003 (Official Gazette of 18 December 2003, No.25320).
54. Constitutional Court E.2001/34, K.2003/2, 14.1.2003 (Official Gazette of 19 November 2003, No.25294).
55. Constitutional Court E.2004/14, K.2004/84, 23.6.2004 (Official Gazette of 22 November 2005, No. 25974).
56. Constitutional Court, E.1995/6, K.1995/29, 6.7.1995 (Official Gazette of 10 February 1996, No.22550).
57. Constitutional Court, E.1994/85, K.1995/32, 13.7.1995 (Official Gazette of 28 September 1996, No.22771).
58. Constitutional Court, E. 1999/51, K.2001/63, 28.3.2001 (Official Gazette of 29 March 2002, No. 24710).
59. For information on investment allowance, see footnote 19 above.
60. Law No. 5479 (Official Gazette of 8 April 2006, No. 26133).

incompatible with the principle of the rule of law and the principle of foreseeability and legal certainty[61].

3.18.4.3. **Testing against Article 1 of the First Protocol ECHR**

In the Turkish legal order neither lower administrative tax courts nor the Supreme Administrative Court (SAC) have the authority to assess the conformity between a retroactive tax law and the Constitution; however, the case is different for the ECHR. With respect to international conventions, the TC provides that 'in situations where domestic legislation conflicts with international treaties regarding human rights, international treaties prevail' (Article 90 (5) TC). As a legal consequence of this provision, the determination of the inconsistency of a retroactive tax law with the ECHR vests primarily on the lower tax courts, or regional administrative courts, or the SAC, wherever the hearing was held before. However, national courts have never tested the retroactivity of a tax statute against Article 1 of the First Protocol ('protection of property') to the ECHR up till now.

As far as the ECHR is concerned, although retroactive tax legislation is not as such prohibited by Article 1 of the First Protocol ('protection of property') (P1-1) to the ECHR, according to the jurisprudence of the European Court of Human Rights (ECtHR)[62], a retroactive tax provision's compatibility with P1-1 may still be tested by answering the question whether, in the taxpayers' specific circumstances, the retroactive application of the law imposed an unreasonable burden on them and thereby failed to strike a fair balance between the various interests involved. For such a test, the reasons for the retroactivity (reasonable purpose test) and the impact of the retroactive law on the position of the taxpayers (confiscatory taxation) must be evaluated[63].

By the combined effect of Article 90(5) of the TC and the ECHR, which is superior to the national law, lower tax courts or the higher courts have the authority to test national retroactive tax legislation under the standards established by the jurisprudence of the ECtHR and determine whether it is in conformity with the ECHR. This evaluation may give cause for a lower tax court or the higher courts to neglect a national retroactive tax rule and apply the relevant provision of the ECHR; meaning that the administrative judiciary would cancel an administrative tax decision that relates to an individual taxpayer on grounds that the tax decision conflicts with the ECHR. However, this outcome may also give rise to various controversies and problematic discussions, including whether such a judicial decision intrinsically refers to a determination of a constitutional conflict between the national tax law and the TC; whether the administrative judiciary would find itself competent to determine such a constitutional problem, or whether on the contrary it would regard its duty and function as only to measure the consistency between decisions of the tax administration and national laws[64].

---

61. Constitutional Court, E.2006/95, K.2009/144, 15.10.2009 (Official Journal of 8 January 2010, No.27456).
62. *M.A. and Others v. Finland*, Fourth Section, Admissibility Decision, Application No. 27793/95, 10.6.2003. The jurisprudence of the ECrtHR produced in the case of *MA and Others v. Finland* first introduced to the Turkish tax literature for discussion in Yalti, *supra* note 36, at pp. 69-70.
63. Furthermore, in the case of *National & Provincial Building Society v. the United Kingdom* (Application No. 117/1996/736/933-935, 23.10.1997), the ECrtHR tested the relevant retroactive tax legislation against P1-1 and found its purpose to be legitimate, and the information on the parliamentary discussions to be adequate with respect to foreseeability. See, Billur Yalti, 'Mülkiyet Hakki versus Vergilendirme Yetkisi: İnsan Haklari Avrupa Mahkemesine Gore Mulkiyet Hakkina Mudahalenin Siniri', *Vergi Dunyasi*, No. 227, July 2000.
64. For the legal issues arising from Article 90(5) of the TC, see Yalti, *supra* note 36, at p.35 et Seq.; Billur Yalti, 'Separation of Powers in Turkish Tax Law', National Report submitted for the EATLP Congress, June 2009, Spain, in: Ana Paula Dourado, ed., *Separation of Powers in Tax Law*, EATLP International Tax Series, vol.7 (The Netherlands, 2010), at pp. 229-231.

3.18.4.4. **Examination method for testing against principle of legal certainty**

The principle of non-retroactivity in taxation covers not only the parliamentary legislation but also the subordinating legislation issued by the Council of Ministers or any other administrative body under their regulatory competence[65]. Accordingly, the Supreme Administrative Court is competent to test the retroactivity of such subordinate legislation against the principles of the rule of law and legal certainty. Since the provisions of the TC are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals (Article 11 TC), the subordinate regulations must be in conformity with the principle of the rule of law the meaning of which has been clarified so far by the TCC in its jurisprudence. For example, the Supreme Administrative Court cancelled the Decree of the Council of Ministers which was issued on 31 December 1992 concerning an increase of income withholding tax rate from 10% to 15% applied to gains arising from government bonds and debentures issued on and after 12 February 1992 on grounds of the principle of the rule of law[66]. Another example is that the Supreme Administrative Court decided to annul the Decree of the Council of Ministers released in August 1991 which decreased the rate of export exemption from 16% to 12% for income derived in 1991, stating that the fact that the Decree was retrospective did not eliminate or diminish the violation of the principle of certainty[67].

3.18.5. **Retroactivity of case law**

Under the Article 153 of the TC, 'the decisions of the Constitutional Court are final. Laws shall cease to have effect from the date of publication in the Official Gazette of the annulment decision. Where necessary, the Constitutional Court may also decide on the date on which the annulment decision shall come into effect. That date shall not be more than one year from the date of publication of the decision in the Official Gazette. In the event of the postponement of the date on which an annulment decision is to come into effect, the Turkish Grand National Assembly shall debate and decide with priority on the draft bill or law proposal, designed to fill the legal void arising from the annulment decision. Annulment decisions cannot be applied retroactively. Decisions of the Constitutional Court shall be published immediately in the Official Gazette, and shall be binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies'.

In Turkish legal order, an annulment decision of the TC does not have any effect on the previously paid tax on a tax assessment, unless an appeal against the tax assessment has been made in time (i.e., within 30 days after the date of the assessment). Thus, taxes paid prior to the annulment decisions are not refundable. However, it is argued in the literature that an annulment decision has retroactive effect on taxes accrued but not yet paid as of the date of the annulment decision[68].

Under the TC, the TCC may postpone for public interest purposes the effective date of an annulment decision prospectively for a year or less. In such cases, although the TTC's decision is published in the Official Gazette, the annulled legislation remains in force until the period determined by the TCC. The TCC establishes such a transitional rule in order to

---

65. Oncel, Kumrulu and Cagan, *supra* note 5, at p.50; Gunes, *supra* note 5, at p.142; Ozguven, *supra* note 5, at p.142 et.seq.
66. Supreme Administrative Court, Grand Chamber, E.1994/364, K. 1996/15, 12.1.1996 (Official website of the Supreme Administrative Court: www.danistay.gov.tr).
67. Supreme Administrative Court, Grand Chamber, E.1992/299, K.1993/63, 9.4.1993 (Official website of the Supreme Administrative Court: www.danistay.gov.tr).
68. Ozguven, *supra* note 5, at pp.200-201.

prevent a legal void, which might arise from the immediate effect of an annulment decision, by giving notice to the parliament to take legislative action. However, the legitimacy and the validity of the application of an annulled legislation which has been found to be unconstitutional but is in fact in force in the legal order for a transitional period is an on-going discussion in Turkish legal discourse. With respect to tax legislation, it is accepted by the Supreme Administrative Court that tax legislation subject to prospective annulment decision of the TCC cannot be applied in pending legal proceedings[69]; thus, the retroactive effect of such TCC judgments is accepted in practice if an appeal against a tax assessment arising from the annulled legislation was made in time prior to the annulment decision. Moreover, it is argued in the literature that on the equity and fairness basis[70], the tax administration should not continue to apply the tax legislation annulled as such and produce a tax assessment based on a legislation the unconstitutionality of which has been declared by the TCC and an immediate legislative action should take place. If such an assessment is made, taxpayers should appeal against the decision and the tribunal should establish a preliminary issue and suspend the trial until the annulment decision enters into force[71].

3.18.6. **Views in the literature**

In the Turkish tax literature, there is a general opinion that the retroactivity of tax statutes is in principle incompatible with the principle of the rule of law and legal certainty and legality. Economics-based views or other non-traditional legal views have not led to a debate.

In the Turkish literature, some authors argue that in exceptional cases, such as under extraordinary economic conditions and circumstances and social needs, the retroactivity of tax laws may be justified if the principle of ability to pay and social and economic justice is maintained[72] and if the retroactive measure is not arbitrary and disproportional[73]. There is a general opinion that whether a retroactive tax law is justifiable can be considered on case-by-case basis by the TCC. However, the jurisprudence established so far by the TTC is strongly opposed by the literature[74].

---

69. Supreme Administrative Court, 3rd Chamber, E.1991/685, K. 1991/2980, 27.11.1991; Supreme Administrative Court, Grand Chamber, E.2006/140, K.2006/203, 6.7.2006. (Official website of the Supreme Administrative Court, www.danistay.gov.tr).
70. Ulku Azrak, 'Anayasa Mahkemesinin Iptal Kararlarinin Geriye Yurumezligi', *Anayasa Yargisi*, vol.1, 1984, at p.159 et.seq.
71. Necmi Yuzbasioglu, 'Anayasa Mahkemesinden Sonra Vergi Ziyai Cezasi', *Vergi Dunyasi*, No. 293, January 2006, s.8.
72. Erginay, *supra* note 27, at p.43. See Sevig who refers to 'compelling reasons regarding public welfare', Veysi Sevig, 'Vergi Yasalarinin Geriye Islerligi', *Yaklaşım*, June 1995, s. 67.
73. See, Cağan, *supra* note 5, at pp.180 -181; Nami Cagan, 'Demokratik Sosyal Hukuk Devletinde Vergilendirme', *Ankara Universitesi Hukuk Fakultesi Dergisi*, vol.37, no.1, 1980, at p.143; Gunes, *supra* note 5, at pp.138-141.
74. a) See for example, Merih Oden and Mustafa Akkaya, 'Hayat Standardi Esasinin Anayasaya Uygunlugu Sorunu', *Ankara Universitesi Hukuk Fakültesi Dergisi*, Vol. 50, No. 2, 2001, at p.26 et.seq; Elif Sonsuzoglu, 'Deprem Nedeniyle 4481 Sayili Yasayla Getirilen Ek Vergi Mükellefiyetleri', *Vergi Sorunlari*, No.139, April 2000, s.138; Gulsen Gunes, 'Anayasa Mahkemesinin Ekonomik Denge Vergisine İlişkin Bir Kararinda 'Geriye Yurumezlik Ilkesi' Yaklaşimina Elestirisel Bakis', *Yaklasim*, June 1996, s.68 et.seq.; Billur Yalti, '1923'ten 2003'e 'Kazandiklarimiz': 'Cumhuriyet Hukuku', 'Kazanamadıklarimiz': 'Hukukun Cumhuriyeti', Vergi Hukukunda Geldigimiz Yere Yakin Tarihten Bakmak: Panaromik bir Calişma', *Ankara Universitesi Hukuk Fakultesi, Cumhuriyetin Kurulusundan Bugune Turk Hukukunun 80 Yillik Gelisimi Sempozyumu*, A.U.Hukuk Fak.Yay. No.538, (Ankara, 2003), at pp.94-95; Ozguven, *supra* note 5, at p. 209 et.seq.
    b) An exceptional view is also expressed in the literature that a new constitutional provision regarding the non-retroactivity of substantive tax laws should be introduced. See, Yildirim Taylar, 'Anayasa Mahkemesi Kararlari Isiginda Vergi Hukukunda Hukuki Guvenlik Ilkesi', *Vergi Dunyasi*, No. 307, March 2007; Gulsen Gedik, 'Cagdas Anayasa Hazirlik Surecinde Vergi Odevinin Yeniden Tasarlanmasi', *Vergi Dunyasi*, No.334, June 2009.

In the view of the author of this report, in either retroactivity or retrospectivity cases, the test established under the criteria of the completion of the taxable event must be complemented by a test based on proportionality; thus, the former criterion should not be taken as an absolute test. In every case, whether a fair balance between public and individual benefits is established, and whether the retroactive law is a rational means in order to realize a legitimate legislative purpose and whether the final result of the law is excessive, arbitrary or disproportional should be considered[75]. For example, in Turkish practice, additional one-off earthquake taxes[76] introduced in 1999 were retroactive in a literal sense; however, covering the emerging financial deficits arising from the earthquake appeared to be a legitimate purpose and the tax burden was proportionally spread through society. Nevertheless, such a legitimate justification arising from economic and financial deficits may not be found with respect to other retroactive additional taxes when attention is paid to the paradoxical practice between bi-annual tax amnesties[77] and frequent additional one-off taxes introduced for the purposes of removing budgetary deficits. With respect to retrospective applications, it must be stated that a rate increase at the end of the year but prior to the completion of the taxable event, such as 25 December or 30 December, cannot be considered justifiable in terms of legal certainty and proportionality. Thus, the period of retrospectivity (whether it is modest or not) must be considered as a criterion for whether the application is proportional.

3.18.7. **Annex – Bibliography**

Books and Articles

Azrak, Ulku, 'Anayasa Mahkemesinin Iptal Kararlarinin Geriye Yurumezligi', *Anayasa Yargisi*, vol.1, 1984.

Bulutoglu, Kenan, *Turk Vergi Sistemi*, 6th ed. (Istanbul: Fakulteler Matbaasi, 1978).

Cagan, Nami, 'Anayasa Tasarısında Vergi Ve Benzeri Mali Yükümlülükler', *Vergi Dunyasi*, No. 13, September 1982.

Cagan, Nami, 'Demokratik Sosyal Hukuk Devletinde Vergilendirme', *Ankara Universitesi Hukuk Fakultesi Dergisi*, vol.37, no.1, 1980.

Cagan, Nami, *Vergilendirme Yetkisi* (Istanbul: Kazanci Hukuk Yayinlari, 1982).

Centel, Nur; Zafer, Hamide, *Ceza Muhakemesi Hukuku*, 4th edition (Istanbul: Beta Yayinlari, 2006).

Dinckol, Abdullah, *Hukuka Giris* (Istanbul: Alkim Yayinlari, 2000).

Dogrusöz, Bumin, 'Yatirim İndiriminde Hak Kullanimi', *Referans Gazetesi*, 7.5.2009.

Erdem, Tahir, 'Yatirim Indirimi İstisnasinin Yururlukten Kaldirilmasinin Hukuki Analizi', *Mali Pusula*, No.22, October 2006.

Erginay, Akif, *Vergi Hukuku* (Ankara: Savas Yayinlari, 1990).

Gedik, Gulsen, 'Cagdas Anayasa Hazirlik Surecinde Vergi Odevinin Yeniden Tasarlanmasi', *Vergi Dunyasi*, No.334, June 2009.

Gunes, Gulsen, 'Anayasa Mahkemesinin Ekonomik Denge Vergisine İlişkin Bir Kararinda 'Geriye Yurumezlik Ilkesi' Yaklaşimina Elestirisel Bakis', *Yaklasim*, June 1996.

Gunes, Gulsen, *Verginin Yasalligi Ilkesi*, 2nd edition (Istanbul: 12 Levha Yayincilik, 2008).

---

75. Yalti, *supra* note 36, at pp. 70-71.
76. Constitutional Court, E. 1999/51, K.2001/63, 28.3.2001 (Official Gazette of 29 March 2002, No. 24710).
77. According to the report released by Ankara Chamber of Commerce, in Turkish tax history, between 1923 and 2004, 37 tax amnesties have been introduced in the form of a full or partial waiver of taxes, interest or penalties. The average indicates that tax amnesties resorted bi yearly by the Governments as a measure for the collection of taxes. See, Ankara Ticaret Odasi, *Affiniza Siginiyorum*, (Ankara: ATO Yayini, 4 July 2004), www.atonet.org.tr/yeni/index.php?p=198&l=1.

Guriz, Adnan, *Hukuk Baslangici*, 4th edition (Ankara: Siyasal Kitabevi, 1994).
Kaneti, Selim, *Vergi Hukuku*, 2nd edition (Istanbul: Filiz Kitapevi, 1989).
Karakoc, Yusuf, *Genel Vergi Hukuku*, 4th edition (Ankara: Yetkin Yayinlari, 2007).
Kumrulu, Ahmet, 'Vergi Davalarında Uygulanan Gecikme Faizi Hakkinda Dusunceler', *Ankara Universitesi Hukuk Fakultesi Dergisi*, Vol.XL, No.1-4, 1988.
Mutluer, Kamil, *Vergi Genel Hukuku* (Istanbul: İstanbul Bilgi Universitesi Yayinlari, 2006.
Nazali, Ersin, 'Vergi Hukukunda Kazanilmis Hak Kavrami ve 01.01.2006-08.04.2006 Tarihleri Arasinda Yapilan Yatirim İndirimi Harcamalarinin Durumu', *Vergi Dunyasi*, No.308, April 2007.
Oden, Merih; Akkaya, Mustafa, 'Hayat Standardi Esasinin Anayasaya Uygunlugu Sorunu', *Ankara Universitesi Hukuk Fakültesi Dergisi*, Vol. 50, No. 2, 2001.
Oncel, M./Kumrulu, A./Cagan, N., *Vergi Hukuku*, 14th edition (Ankara: Turhan Kitabevi, 2006).
Ozguven, Volkan A., *Turk Vergi Hukukunda Geriye Yurumezlik İlkesi* (Ankara: Maliye ve Hukuk Yayinlari, 2007).
Saban, Nihal, *Vergi Hukuku*, 5th edition, (Istanbul: Beta Yayınlari, 2009).
Sevig, Veysi, 'Vergi Yasalarinin Geriye Islerligi', *Yaklaşım*, June 1995.
Sonsuzoglu, Elif, 'Deprem Nedeniyle 4481 Sayili Yasayla Getirilen Ek Vergi Mükellefiyetleri', *Vergi Sorunlari*, No.139, April 2000.
Taylar, Yıldırım, 'Anayasa Mahkemesi Kararlari Isiginda Vergi Hukukunda Hukuki Guvenlik Ilkesi', *Vergi Dunyasi*, No.307, March 2007.
Yalti, Billur, '1923'ten 2003'e 'Kazandiklarimiz': 'Cumhuriyet Hukuku', 'Kazanamadıklarimiz': 'Hukukun Cumhuriyeti', Vergi Hukukunda Geldigimiz Yere Yakin Tarihten Bakmak: Panaromik bir Calişma', *Ankara Universitesi Hukuk Fakultesi, Cumhuriyetin Kurulusundan Bugune Turk Hukukunun 80 Yillik Gelisimi Sempozyumu*, A.U.Hukuk Fak.Yay. No.538, Ankara, 2003.
Yalti, Billur, 'Mülkiyet Hakki versus Vergilendirme Yetkisi: İnsan Haklari Avrupa Mahkemesine Gore Mulkiyet Hakkina Mudahalenin Siniri', *Vergi Dunyasi*, No. 227, July 2000.
Yalti, Billur, 'Separation of Powers in Turkish Tax Law', National Report submitted for the EATLP Congress, June 2009, Spain, in *Separation of Powers in Tax Law*, ed. Ana Paula Dourado, EATLP International Tax Series, vol.7, The Netherlands, 2010.
Yalti, Billur, *Vergi Yukumlusunun Haklari*(İstanbul: Beta Yayınları, 2006).
Yalti, Billur; Ozgenc, Selcuk, *Vergi Hukuku Pratik Calisma El Kitabi*, 2nd edition (Istanbul: Beta Yayinlari, 2007).
Yuzbasioglu, Necmi, 'Anayasa Mahkemesinden Sonra Vergi Ziyai Cezasi', *Vergi Dunyasi*, No. 293, January 2006.

Reports

Ankara Ticaret Odasi, Affiniza Siginiyorum, (Ankara: ATO Yayini, 4 July 2004), (http://www.atonet.org.tr/yeni/index.php?p=198&l=1).

Laws

Kanunlarin ve Nizamnamelerin Sureti Nesir ve İlani ve Meriyet Tarihi Hakkinda Kanun, No.1322 (Official Gazette of 4 June 1928, No.904).
Katma Deger Vergisi Kanunu, No.3065 (Official Gazette of 25 November 1984, No. 18563).
Kurumlar Vergisi Kanunu, No. 5520 (Official Gazette of 21 June 2006, No. 26205).
Law No. 1086 on the Procedural Rules Applicable to Civil Proceedings (Official Gazette of 2, 3, 4 July 1927, Nos. 622, 623, 624).
Law No.1137 (Official Gazette of 31 March 1969, No. 13162).
Law No. 3986 (Official Gazette of 7 May 1994, No.21927).
Law No. 4369 (Official Gazette of 29 July 1998, No.23417).
Law No. 4444 (Official Gazette of 14 August 1999, No. 23786).
Law No. 4481 (Official Gazette of 26 November 1999, No. 23888).

Law No. 5479 (Official Gazette of 8 April 2006, No. 26133).
Law No. 5904 (Official Gazette of 3 July 2009, No.27277).
Turk Ceza Kanunu, No. 5237 (Official Gazette of 12 October 2004, No.25611).
Turk Medeni Kanunu, No. 4721 (Official Gazette of 8 December 2001, No.24607).
Turk Medeni Kanununun Yururluğu ve Uygulama Sekli Hakkinda Kanun, No. 4722 (Official Gazette of 8 December 2001, No.24607).
Vergi Usul Kanunu, No.213 (Official Gazette of 10 January 1961, No.10703).

Cases

Constitutional Court, E.1989/6, K.1989/42, 7.11.1989 (Official Gazette of 6 April 1990, No.20484).
Constitutional Court, E.1995/6, K.1995/29, 6.7.1995 (Official Gazette of 10 February 1996, No.22550.
Constitutional Court, E.1994/85, K.1995/32, 13.7.1995 (Official Gazette of 28 September 1996, No.22771).
Constitutional Court, E.2000/21; K. 2000/16, 6.7.2000 (Official Gazette of 29 November 2000, No.24245).
Constitutional Court, E. 1999/51, K.2001/63, 28.3.2001 (Official Gazette of 29 March 2002, No. 24710).
Constitutional Court, E.2001/34, K.2003/2, 14.1.2003 (Official Gazette of 19 November 2003, No.25294).
Constitutional Court, E.2001/36, K.2003/3, 16.1.2003 (Official Gazette of 21 November 2003, No. 25296).
Constitutional Court, E.2001/392, K.2003/60, 4.6.2003 (Official Gazette of 18 December 2003, No.25320).
Constitutional Court, E.2004/14, K.2004/84, 23.6.2004 (Official Gazette of 22 November 2005, No. 25974).
Constitutional Court, E.2005/128, K.2008/54, 7.2.2008 (Official Gazette of 1 July 2008, No.26923).
Constitutional Court, E.2006/95, K.2009/144, 15.10.2009 (Official Journal of 8 January 2010, No.27456.
European Court Human Rights, *Kruslin v. French*, Application No. 7/1989, 27 March 1990.
European Court Human Rights, *National & Provincial Building Society v. the United Kingdom*, Application No. 117/1996/736/933-935, 23.10.1997.
European Court Human Rights, *Spacek, s.r.o. v. The Czech Republic*, Application no. 26449/95, 9 November 1999.
European Court Human Rights, Fourth Section, *M.A. and Others v. Finland*, Admissibility Decision, Application No. 27793/95, 10.6.2003.
Supreme Administrative Court, 3rd Chamber, E.1991/685, K. 1991/2980, 27.11.1991.
Supreme Administrative Court, 4th Chamber, E.1972/5771, K.1973/4033, 18.9.1973.
Supreme Administrative Court, Grand Chamber, E.1992/299, K.1993/63, 9.4.1993.
Supreme Administrative Court, Grand Chamber, E.1994/364, K. 1996/15, 12.1.1996.
Supreme Administrative Court, Grand Chamber Unification Decision, E.1988/5, K.1989/3, 3 July 1989.
Supreme Administrative Court, Grand Chamber, E.2006/140, K.2006/203, 6.7.2006.

3.19.
United Kingdom[1]

David Williams[2]

3.19.1. Terminology

3.19.1.1. Distinction between retroactivity and retrospectivity

There is no distinctive answer for this in the United Kingdom. All forms of legislative or judicial action that result in a legal provision taking effect before the date on which it was officially promulgated are identified by the one term 'retrospective' without any further identifying phrases. The choice of use of 'retroactive' or 'retrospective' appears to be a matter of regional common usage of the English language, with no identifiable international distinctive use of either term. In both England and Wales and in Scotland[3] preference is given widely to the use of 'retrospective' rather than 'retroactive'[4] by both lawyers and politicians but with little formal distinction being made between the meanings of the terms. This appears true in Ireland as well. By contrast, in the USA the term 'retroactive' is used (with a stress on the first syllable not present in European English usage) rather that 'retrospective'. That appears to have been the approach in Canada also, though more recently the terms have been given separate meanings in the courts.[5] Australia is somewhere in between.[6] It is therefore intriguing to note that the European Court of Justice

1. Note: the replies in this report have been provided to the original questionnaire, but have been updated to June 2012 by the author. The author is most grateful to the editors for finalizing the draft of his national report and adding the standard headings.
2. I must emphasize that my views do not represent the official views of any body or person – least of all any of those in the Westminster village (the inner group of politicians, policy advisers and lobbyists in London) – and are purely personal comments.
3. The focus of this paper is on legislation and cases about taxation, where the law of Scotland should be the same as the law of England and Wales. Procedure is not the same in the Scottish courts to the other British courts, and general jurisprudence is not the same. Any comment on cases other than taxation cases in this paper is limited either to the law of England and Wales or to other areas where the law is the same in Scotland as in England and Wales. The House of Lords was the final court for both national jurisdictions until September 2009. It is replaced by the United Kingdom Supreme Court.
4. For example, the standard work *Words and Phrases legally defined*, 3rd edition, 1990 (Butterworths) did not even include a definition of 'retroactive' while defining 'retrospective' as an ambiguous term.
5. See Re Royal Canadian Mounted Police Act (Can) [1991] 1 *FCR* 529, 548 where a usage similar to that of the Dutch usage is suggested. This does not seem to have influenced the debate elsewhere in the English-speaking world. Does it reflect the bilingual nature of Canada?
6. Source: searches of terminology use on various Google national search pages (e.g. www.google.co.uk, www.google.com, www.google.com.au etc) and also through various electronic case law databases in particular that at www.bailii.org.uk).

follows American usage[7] and not that of its English-speaking Member States.[8] I follow the clear majority British usage in using the term 'retrospectivity' in this paper.

3.19.1.2. **Relevance of tax period**

In the sense used in this question, retrospectivity is standard practice in United Kingdom tax statutes and rarely receives any analytical comment in the context of taxes in practical or theoretical literature.[9] This is because of the practice for over 100 years of introducing new tax laws at the beginning of the tax year (6 April for income tax and National Insurance Contributions; 1 April for all other direct taxes; dates vary for indirect taxes) in one Finance Act following a Budget published shortly before the tax year begins. The Provisional Collection of Taxes Act 1968 provides that if the House of Commons passes a Budget Resolution providing for a tax or a change in a tax within one month of 5 April in a year, and the Finance Act is enacted by 5 August that year, then the tax provision operates as if it starts at the beginning of the income tax or financial year.[10] The retrospective aspect of this process is a necessary result of the continuing constitutional fiction that taxation is imposed annually. Income tax is still an annual tax.[11] It cannot be levied for a tax year unless there is legislation in that year imposing it. There must therefore be a Finance Act early in every tax year. I illustrate below the operative dates from which a Finance Act takes effect.

3.19.1.3. **Interpretative statutes**

a. Phenomenon of 'interpretative statutes' explicitly known?
Yes. There is a general Act of Parliament called the Interpretation Act 1968. Section 16 (General Savings) deals with issues that arise, including the retrospective effect of legislation, when one enactment is changed by another.

The text is:

---

7. Is this an example of European English diverging from British (and Irish) English?
8. The House of Lords and the courts below have on several occasions recently cited passages from ECJ decisions using the term 'retroactive' while individual judges use the term 'retrospective'. Most noticeable are cases where the United Kingdom Advocate General has also used the term 'retrospective' in a case coming from the United Kingdom, and is cited as doing so, so leaving the ECJ use of the term standing as an unavoidably obvious different use of language. See for example *Fleming v HMRC* [2008] UKHL 2 where all the British judges and Advocate General Jacobs use 'retrospective' while the judgment of the ECJ is cited as using 'retroactive'. No attempt is made to differentiate the meanings of the terms.
9. You are invited to read the introductory provisions at the start of every modern annual edition of *Tolley's Yellow Tax Handbook* which deals with the direct taxes. The 2006 edition advises: 'In view of the increasing practice of passing tax legislation with retrospective effect, it is necessary when dealing with past years to consider whether the provisions have been affected or amended by subsequent legislation. It then sets out a list of retrospective changes made by the Finance Act 2006. The list contains 51 separate retrospective changes. It is clear from the list that the publishers do not regard as retrospective anything that took effect on or after the start of the tax year or financial year in which the Act took effect (it was given Royal Assent on 19 July 2006). It notes the dates on which the measures came into effect. Four – one dating back to 1992 – are deemed always to have had effect, in other words are deemed to have been passed by Parliament when the original legislation was passed.
10. This followed a series of cases brought by an MP, Mr Thomas Bowles, in 1910 to 1912 asking the courts to strike down taxes levied under resolutions as unconstitutional. Pragmatism triumphed over principle and the procedure described above has operated (not always entirely within the time frame set) since an Act was passed in 1913 to the same effect as the 1968 Act without any further legal challenges.
11. The Income Tax Act 2007 and linked legislation requires to be put into effect in any tax year by a 'trigger' section in the annual Finance Act imposing income tax in that year.

'16 General savings

1. Without prejudice to section 15, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears, –
   a. revive anything not in force or existing at the time at which the repeal takes effect;
   b. affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;
   c. affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment;
   d. affect any penalty, forfeiture or punishment incurred in respect of any offence committed against that enactment;
   e. affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;

   and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed.'

Section 23 of that Act applies the same presumptions to subordinate legislation.

b. Legal basis for 'interpretative statutes'

The United Kingdom has no written constitution in the sense meant here, nor any General Tax Act, nor any special terminology of this kind. There is nothing directly relevant in the Interpretation Act 1968 other than section 16. Section 16 is a statutory presumption enacted to save the provisions having to be repeated in every Act of Parliament.

It has been common practice for governments throughout the last 100 years to impose 'the view of the tax authorities' in legislation in the sense that it uses an Act of Parliament to reverse the effect of a court decision or to remove a doubt about interpretation in favour of the official view. There are no general legislative provisions dealing with this. The courts will give effect to the will of Parliament.[12]

3.19.1.4. **Validation statutes**

As noted above, Parliament may decide to reverse the effect of a decision of the courts on a point of tax law to restore the approach taken by the tax authorities or to 'plug' a 'loophole' that allows the tax charge to be sidestepped (avoided) legally in a way that was not intended. The decision when that law should start is a policy decision for the Treasury which is normally endorsed by Parliament. In recent years such legislation is more likely to occur while a case is still going through the appeal system rather than waiting for the final appeal to the Supreme Court (until 2009, the House of Lords). In many cases the legislation will operate from the beginning of the next tax year. In some cases an official Government announcement is made in Parliament of an intention to legislate and effect will be given to that legislation from the date of the announcement. In other cases the relevant government department (sometimes the Treasury and sometimes Her Majesty's Revenue and Customs) issues a press release announcing the plans to legislate. Legislation that predates any official warning is rarer, but again it is a matter for Parliament to consider on any specific occasion on which the point arises. The debate is political and perhaps economic or commercial in

12. This answer is given without reference to additional considerations arising from the operation of European Union law in the United Kingdom. Separate consideration is given below to whether the European Convention on Human Rights, which became internally effective in the United Kingdom under the Human Rights Act 1999 from 2000, now provides additional answers to this question.

content and not usually framed by reference to legal rules (though 'human rights' are often invoked such debates in a political sense).

3.19.1.5. **Comparison moment**

The general rule is that an Act of Parliament comes into force on the date of the Royal Assent (and before it is published). In practice, that rarely happens for major Acts, and never for fiscal measures. The normal practice is that the Act will itself either (a) provide for the date or dates from which it is to have effect or (b) provide that the Act will come into effect on such day or days as are provided by government order (statutory instruments called Commencement Orders) (these do not in practice predate the date of the order and usually postdate it). As noted above, the standard practice for Finance Acts is to provide that the main measures, such as rates of tax, come into force at the beginning of a financial year – usually the year in which they are given the Royal Assent – with effect being given to much of the content by the 1968 Act and Budget Resolutions. So no 'comparison moment' arises.

3.19.1.6. **Concept of retrospectivity**

As 'retrospectivity' in the wide sense employed here has been the standard practice of all political parties that have attained government in the United Kingdom for many years past, there is in practice a focus on specific retrospective measures only if (a) they seek to alter the effect of a judicial decision after it has been taken with the aim of restoring the situation on which that decision was based (and not merely the application of the practice to other similar cases) or (b) they seek to change the way in which tax laws apply to a situation after the taxpayer (or taxable person) is no longer able to change that situation. See for example the case of *James v IRC* mentioned below.[13]

An example of how modern UK Finance Acts come into effect is the Finance Act 2004. This followed a Budget Statement on 17 March 2004 (the usual time), was published on 15 July 2004 (unusually late) and received the Royal Assent on 22 July 2004 (the usual time). In the wide sense, everything that took effect before 15 July 2004 or applied from that date to arrangements made before 15 July 2004 was retrospective. In a fiscal sense, it was retrospective for direct taxes if it took effect before the start of the tax year on 1 or 6 April 2004. In a budgetary sense, it was retrospective if it took effect before the Budget resolutions passed on 17 March 2004. In the narrowest sense it was retrospective for direct taxes if it took effect from the date on which an announcement was made about the new measure (or no announcement was made and the provision took effect before it was introduced to the House of Commons as a clause in the relevant Finance Bill.) Provisions in the Act took effect retrospectively in all those senses. Nor was there anything unusual about most of those measures.

The rate of tobacco products duty was increased from 6pm on 17 March 2004 ('as the Chancellor sat down').

The rate of alcoholic liquor duty was increased from midnight on 21 March 2004 (to allow shops time to change their prices).

Amendments to the law to deal with VAT avoidance schemes came into effect on 22 July 2004 to allow for regulations to be made, with the actual date to be given in the regulations.

Income tax rates and allowances came into effect on 6 April 2004.

The corporation tax rates and allowances came into effect on 1 April 2004.

Changes to the law on transfer pricing to deal with the European Court's judgment in the *Lankhorst-Hohorst* case (C-324/2000) were applied to chargeable periods beginning on

13. *Infra* note 15.

or after 1 April 2004 (6 April for income tax), with special provision made to divide accounting periods that straddled the date.[14]

Measures to counteract the decision of the English Court of Appeal in *Camas v Atkinson* [2004] STC 860 (about capital costs of investment companies) came into effect in the same way as the transfer pricing changes.[15] The opportunity was taken to change other related tax provisions at the same time. The Treasury was also given power by regulation to make further amendments to legislation to complete the changes.

The accounting principles on which companies prepare their accounts for tax purposes were changed to allow companies to prepare their tax accounts in line with the corporate requirements of EC Regulation 1606/2002. This was available for all accounts periods starting 1 January 2005.

Provision was made for a new scheme dealing with construction industry sub-contract workers, with intended start date for the scheme announced as April 2006 but the details left to regulations.

Changes were made to a number of allowances for personal income tax, some from 6 April 2004 and some from 6 April 2005. An amendment to the provisions allowing individuals to deduct certain charitable payments from their taxable income were given effect from 6 April 2003. This was to the advantage of the taxpayers and charities.

A detailed measure to impose a charge to income tax by reference to the enjoyment of property previously owned was introduced from 6 April 2005. This was widely criticized in political terms as retrospective because it imposed a tax charge on individuals who had given away property (usually to close relatives) but retained some use of the property (e.g. giving away ownership of a house but continuing to live there rent free as a tenant for life, as a way of avoiding inheritance tax). The criticism was because the individuals could not now take back what they had given away so as to undertake the arrangements in a way that would avoid the new tax charge. In what legal, as against political, sense was this retrospective?

Other income tax changes were made for varying reasons from 7 May 2004, 8 April 2004 and 18 June 2004.

New rules were introduced to deal with taxation of payments of interest and royalties to give effect to EC Council Directive 2003/49/EC of 3 June 2003 (the Interest and Royalties Directive). This broadly took effect on 8 April 2004, but special provision was made to allow taxpayers to claim exemption from 1 January 2004. These deem payments to have been made under the Act after it was passed, and also gave retrospective effect expressly to the relevant regulations (see s. 106).

Measures to counteract tax avoidance involving loss relief or partnerships was brought into effect from 10 December 2003, the day on which an Inland Revenue press release announced that the government would legislate. Measures to block companies from obtaining tax advantages from schemes involving artificial payments were introduced from 2 July 2004, the date on which the Treasury announced that it would seek legislation in the Finance Bill to deal with the issue. Measures to stop tax avoidance through 'gilt strips' took effect from 15 January 2004, again the date of the relevant announcement in an Inland Revenue press release. Other measures took effect, following announcements, on 3 March 2004 and 2 July 2004.

Major reforms to taxation of pension schemes were provided, with effect from 5 April 2006. These had been subject to major consultation since 2002.

An amendment to the Finance Act 2001 (on aggregates levy) was deemed to have come into force on 1 April 2004 (to avoid losing an EU grant facility in Northern Ireland).

---

14. See s. 37 of the Act, an unusual approach.
15. See s. 38, amending s 75 of the Taxes Act 1988 to restore the Revenue view of the operation of the section. Ss. 43 and 44 included transitional provisions adopting the straddle approach similarly to s. 37

The final example from that Act is new legislation requiring taxpayers and their advisers to disclose 'notifiable' tax avoidance schemes to the tax authorities. This covers proposed schemes as well as schemes that have been implemented. It was announced as coming into effect on 1 August 2004.

3.19.1.7. **Distinction between substantive and procedural statutes**

As noted above, the general approach in United Kingdom law is that substantive changes take place from the date of Royal Assent (or, in the case of Finance Acts, from the beginning of the tax year) unless other provision is made. The normal approach to procedural changes is that they have immediate effect on enactment (or other commencement date) and apply to all existing transactions or cases.[16]

However, there are often transitional 'grandfather' provisions dealing with current issues.

For example, when the new appeal tribunal structure for all taxes was introduced in April 2009 there were important differences to the procedural rules that applied to existing appeals. But both parties and judges were given considerable freedom to decide if the old rules or the new rules (or some combination of the two) should apply to tax appeals directly affected by the changes.

By contrast, the United Kingdom government's attempts to impose retrospective time limits on late claims for adjustments of value added tax liabilities were found by the European Court of Justice to be in breach of European Union law. This is mentioned not because of the European Union point but to make the point that there was no legal principle of United Kingdom law (or of English law) that was or could have been argued by the taxable person to achieve the same limit on retrospective removal without prior announcement of a procedural right to make a late claim. In particular, the appeal in the European jurisprudence to the concept of proportionality is not reflected in this way in English law.

3.19.2. **Ex ante evaluation of retroactivity**

3.19.2.1. **Constitutional limitations to retroactivity of tax statutes**

There are none.[17]

---

16. See Lord Brightman in *Yew Ban Tei v Kandarann Bas Mara* [1983] 1 AC 553, 558 (opinion of the Privy Council): '… there is at common law a prima facie rule of constitutional law that a statute should not be interpreted retrospectively so as to impair an existing right unless that result is unavoidable on the language used … There is, however, said to be an exception in the case of a statute which is purely procedural because no person has a vested right in any particular course o procedure, but only a right to prosecute or defence a suit according to the rules for the conduct of an action for the time being pursued.'
17. 'As the constitutional law of England stands today, Parliament has the power to enact by statute any fiscal law, whether of a prospective or retrospective nature and whether or not it may be thought by some persons to cause injustice to individual citizens': Slade J in *James v IRC* [1977] STC 280 at 204. That case concerned a challenge to the retrospective effect of a provision in the finance Act 1974 that amended the 1973 Finance Act to increase the top rates of income tax charged in that – the 1973 – Act for that – the 1973 – tax year. The judge cited the authorities about interpreting a statute to ensure it had a clear meaning, and found that it was completely clear. But compare the decision of the five-judge Privy Council in *Income Tax Commissioner v Esperance* [1983] STC 789. Three of the judges found that an income tax measure of the Mauritius Parliament was clear and was clearly retrospective. Two other judges, dissenting, found that the language of the draftsman was obscure and unclear and that the provision was not retrospective. And see also Lord Morris in *CEC v Thorn Electrical Industries* [1975] STC 617, [1975] 1 WLR 1661: 'an ambiguity is not created merely because an unsuccessful argument as to the meaning of words has been skillfully presented.'

3.19.2.2. **Transition policy of government**

The reader is referred to the answer given to the previous question.

3.19.2.3. **Ex ante control by an independent body**

England adopted a Bill of Rights following the Dutch conquest of England in 1688/9 under William of Orange.[18] That provided that no tax could be levied without consent of Parliament. This removed Royal Prerogative and other royal powers from the power to levy tax but put no other limits in their place. And none have been put in place since. (Indeed, the situation is further limited because since 1912 the House of Commons has exercised the powers of Parliament alone.[19]) Nor is there any formal body to advise Parliament – or now the House of Commons – on the exercise of its powers.

3.19.3. Use of retroactivity in legislative practice

3.19.3.1. **'Legislating by press release'**

This is used. See several examples in connection with the Finance Act 2004 above. It is used whenever it is felt appropriate.

3.19.3.2. **Retroactive effect further back than first announcement**

The reader is referred to the answer given to the previous question.

3.19.3.3. **Pending legal proceedings**

Retrospective effect is given to measures designed to affect existing cases. Sometimes these have retrospective effect although this overrides the effect of a case that has been decided or is to be decided. More common is the approach of changing the law but not applying it to any case in which notice of appeal was not given before a given date, perhaps the date on which the law was passed or the date on which the Government announced that it was going to ask Parliament to change the law.[20]

3.19.3.4. **Favourable retroactivity**

See the examples in the Finance Act 2004 above. These are not totally atypical as examples (to use a deliberate English double negative). The use of such legislation is not uncommon

18. For a highly readable recent account of how the Dutch conquered the English, who then reversed the process, see Lisa Jardine, *Going Dutch: How England plundered Holland's glory* (Harper Press, 2008).
19. Following the Parliament Act 1911.
20. For social security benefit purposes (but not tax) there is a general legislative power that prevents the result of an appeal applying to cases that have not been appealed at the date of a decision if the decision alters the previously accepted official interpretation of a legislative provision: Social Security Act 1998, sections 25 (decisions involving issues that arise on appeal in other cases) and 26 (appeals involving issues that arise on appeal in other cases).

(although it may be that only the government department and the taxpayer concerned are aware of the potential litigation). As to the situations in which it occurs, it depends.[21]

3.19.4. Ex post evaluation of retroactivity (in case law)

3.19.4.1. Testing against the Constitution and legal principles

There is no basis for a test against legal principles, other than as arising from issues of European Union law or the European Convention of Human Rights.

3.19.4.2. Examination method

The reader is referred to the answer to the previous question.

3.19.4.3. Testing against Article 1 of the First Protocol ECHR

This was tested in the Court of Appeal of England and Wales in R(Huitson) v Her Majesty's Revenue and Customs.[22] This was a challenge by judicial review of the provisions in section 58 of the Finance Act 2008. The section was designed to counteract a tax planning scheme involving a foreign trust with UK resident trustees in combination with a foreign partnership. The section changed the definition of who were partners of the partnership in a way that stopped the scheme working. The amendments were expressly stated as to 'treated as always having had effect'. The section made clear that this applied to all tax laws since 1970. The law was passed despite a campaign against it because of its retrospective effect.[23]

The section was challenged as being in breach of Article 1 of the First Protocol. In a strong judgment, the Court of Appeal accepted that the claim by the appellant for tax relief so as not to have to pay UK income tax was a 'possession' for the purposes of Article 1. It did so by confirming the decision of the judge in the Administrative Court who ruled that the section did not violate the article.[24] The test applied was whether the section 'imposed an unreasonable burden on the claimant and thereby failed to strike a fair balance between the various interests involved.'[25] The court found that the appellant had entered into a scheme that was wholly artificial and of doubtful efficacy. The section prevents some taxpayers gaining GBP 200 million at the expense of taxpayers generally. It avoided lengthy litigation. It was proportionate. And there was no legitimate expectation affected, as this was a scheme that had not been accepted by a court or tribunal or by the tax authorities.

At the same time the Court of Appeal heard a challenge to the section made under European Union law.[26] The challenge was that the effect of section 58 was incompatible with the

---

21. On what? I am not quite sure. There is considerable secrecy about much tax litigation, and it can be some years before a dispute becomes public knowledge. This is a result of several factors including: a high level of confidentiality respected by the government department (including the fact that government ministers never get involved in individual tax cases); the presence of powerful confidentiality clauses and strong professional standards protecting publicity between taxpayers and their advisers; and the absence of publicity in most cases about ongoing appeals until a decision is made by the tribunals. And until relatively recently most first level tribunal decisions in direct tax cases were not published at all.
22. [2011] EWCA Civ 893.
23. See www.notoretrotax.org.uk.
24. [2010] EWHC 97 (Admin).
25. See *MA and 34 others v Finland* (2003) 37 EHRR CD 210.
26. *R(Shiner) v HMRC* [2011] EWCA 892.

freedom of movement of capital within the EU. The Court agreed with HMRC that there was no relevant movement of capital on the facts of the case, so the challenge failed. The Court set out, but did not decide, other issues of EU law said to be relevant to the case. It adopted its decision about violation of human rights in the Huitson case for this case also.

The United Kingdom Supreme Court has refused permission for an appeal against these decisions. This therefore confirms the relevance of a challenge against retroactive laws under Article 1 of the First Protocol, but suggests that this is unlikely to be successful for abusive tax avoidance where there has been no indication that the avoidance is accepted by the tribunals or tax authorities. Since 2003 all tax avoidance schemes must be registered with HMRC. It will be important with regard to retrospective legislation about any new scheme to establish if it was registered and if so whether HMRC challenged it at that time.

3.19.4.4. **Examination method for testing against principle of legal certainty**

Other than in cases involving European Union law or human rights law, British courts approach the issue of certainty not as a separate principle but as an aspect of the task of a court of identifying the true intention of Parliament in passing legislation. The courts operate a number of presumptions when doing this, and some may be relevant to this question. For example, the courts will presume, if legislation is otherwise ambiguous, that Parliament intended that the law should be consistent with United Kingdom treaty obligations rather than inconsistent. In a similar way, the courts will test examine legislation to see if on a proper interpretation of the law it is the intention of Parliament that the law have retrospective effect. If the intention of Parliament is clear (and it usually is in modern provisions) then the courts will take the issue of certainty no further. This has not been articulated as an application of the principle of legal certainty but rather of the common law duty of judges to ensure fairness.[27]

3.19.4.5. **Interpretations by courts to avoid retroactivity**

It is not unknown for a court to deal with a difficult situation, which might include an issue of this sort, by resolving the problem in favour of a party disadvantaged by the difficulty by reference to some other issue and not the issue that caused the difficulty. But in cases where the court, having approached the case in the way outlined in the previous answer, finds that Parliament cannot have intended the unfairness occasioned by a retrospective application of a rule, it will adopt another interpretation. I am not aware of any recent tax case in which that has been done with regard to substantive tax law in the United Kingdom.

3.19.4.6. **Reasons for lack of judicial limits to retroactivity**

In the United Kingdom the reason is simple: Parliament is sovereign.

---

27. 'It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree. The greater the unfairness the more it is to be expected that Parliament will make clear if that is intended.' Originally part of a judgment of Staughton LJ, but since endorsed and followed on several occasions, for example by the House of Lords in *Plewa v Chief Adjudication Officer* [1995] 1 AC 249 (HL). This is a longstanding judicial approach: see for example *Smith v Callender* [1901] AC 297 and *Ingle v Farrand* [1927] AC 417. See also *L'Office Cherifien des Phosphates v Yamashita-Shinnion Steamship Co Ltd* [1994] 1 AC 486 (HL) for a thorough review of the case law and a further statement of the test: 'whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to means what they might appear to say' (Lord Mustill at p 525).

3.19.5. Retroactivity of case law

3.19.5.1. Temporal effect of judicial change of course

The United Kingdom's Supreme Court started work in October 2009. Previously its jurisdiction was exercised by the Appellate Committee of the House of Lords. It was very rare for the House of Lords to change its mind about anything as it followed a rule that it is normally bound by its own decisions. The Supreme Court is following this approach in taxation cases. The practical answer to this issue with regard to decisions about taxation is that any such change would be made by legislation and not by the courts.

More generally, the Appellate Committee of the House of Lords considered the questions of the prospective and retrospective[28] effects of judgments in detail recently in *National Westminster Bank v Spectrum*.[29] Some of their Lordships considered that the House of Lords had the power to make decisions that were proactive only in effect, but none identified any specific situation on which this could be done, and all of them agreed that there had been no example of the operation of that power to date. However, they recognized that Parliament sometimes provides that decisions of the courts or tribunals have prospective effect only, save for the individual case.[30]

It might be argued that there is a major exception to that general statement in relation to tax cases. This is with regard to the way United Kingdom courts interpret legislation. Traditionally, the United Kingdom courts took a very literal approach to taxation cases, including cases of tax avoidance. In the 'ground-breaking' case of *Ramsay v IRC*[31] the House of Lords set out a new more liberal approach to interpreting tax statutes. But this is not a new rule of law or a new principle, as the House of Lords itself emphasised in 2006[32]. After a powerful debate in the higher courts, the general consensus is that the 'new' approach as it was termed at the time is a reminder that tax statutes should be interpreted in the same way as any other statutes. Increasingly, however, this takes into account the policy behind the legislation as well as the wording of the legislation itself.[33]

3.19.6. Views in the literature

3.19.6.1. Opinions regarding retroactivity

As indicated above, there is little sustained comment on this question outside the context of specific provisions. There was some comment in the professional and business literature about the decision in *Huitson* 'opening the door' to retrospective legislation but little fundamental analysis.

---

28. On a point of linguistic usage, while 'prospective' is the opposite term to 'retrospective', 'proactive' has a different common usage and is not identical in meaning. It is used with the meaning 'anticipatory' or acting in advance to anticipate a difficulty before the difficulty occurs. 'Prospective' has a more passive sense of 'looking forward' rather than 'acting forward'. I note that 'prospective' is used as the opposite term to 'retroactive' rather than 'proactive' in the passage quoted from Graetz and Kaplow.
29. [2005] UKHL 41.
30. See as an example the devolution Acts of 1998 (e.g. the Scotland Act 1998).
31. [1982] AC 300. The courts have looked at this issue several times since – see the *Tower MCashback* decision noted below.
32. *Deutsche Morgan Grenfell Plc v HMRC* [2006] UKHL 49.
33. The most recent decision of the Supreme Court is in *HMRC v Tower MCashback LLP1* [2011] UKSC 19, where the Supreme Court overturned decisions in the courts below to affirm a decision of the Tax Tribunal disallowing a tax avoidance scheme.

3.19.6.2. **Debate on law and economics view on transitional law**

That debate is a fascinating debate but – aside from the issue of section 58 – is not one that has attracted too much attention in Britain. There are, I suggest, two separate issues behind it which have received attention. The first is the question of the extent to which taxation is used as a policy instrument to achieve non-fiscal objectives. But it is difficult to see how retroactive taxes (to use the questionnaire's term) will achieve some of those objectives. For example, while there may be a consensus that smoking is bad and therefore should be seen as an appropriate object of a 'sin tax', it is difficult to see how that objective is enhanced by raising taxes after people have smoked (even if that could be done in an administrative effective way). But it could be enhanced by cutting taxes if someone can prove he or she has not smoked for a defined period. Is that retrospective taxation? To answer that, we must answer another question. Does this debate include negative taxes as well as positive taxes? For example, was the retrospective measure in the Finance Act 2004 that increased the tax allowance made available on a charitable gift a form of retrospective taxation? Or was it an obscure way of giving a new public finance grant to charities that had been successful in collecting funds in the past?

The second issue is that of non-payment of imposed taxes by evasion, avoidance or a combination of the two. When is it proper to impose criminal liability (including administratively imposed penalties and fines) or civil liability (including ordinary tax liability) on a taxpayer or third party that so arranged matters that tax was not paid when, in the view of the government, it should have been paid?

As a broad statement, the combination of specific criminal offences against taxation laws and the common law offence (in England and Wales) of cheating the public revenue are wide enough to deal with what would generally be perceived as criminal activity without the need to introduce new laws. Considerable sums are collected from previous evaders with minimum publicity and no public criminal prosecutions.

The main debates in the United Kingdom have been about defining what is unacceptable avoidance of taxation and then designing the means to limit it. That debate is beyond the scope of this paper although in practice the two issues interact.

If I may conclude with a personal comment, it is that there remains little discussion about retrospective tax legislation outside the 'Westminster village' and those who seek to influence the current policy makers.

3.20.
United States

Charlotte Crane

3.20.1. Introduction

In the United States there is no source of authoritative law affecting this area other than judicial decisions examining legislative acts under general constitutional provisions. There is, furthermore, a general sense that the common law approach to judicial decisions may result in decisions – even by the same court – that can be reconciled only in terms of their results and not necessarily in terms of the specific language or rationale stated in the opinion. As a result, it is almost impossible to answer the questions posed in section 3.20.2 'On terminology' separately from the questions posed in section 3.20.5 'Ex post evaluation of retroactivity in case law.' This difficulty is compounded by the fact that since the introduction of the Graetz/Kaplow/law and economics approach, most traditional law review articles deal with the issues only from a normative perspective; few attempt to deal with the actual practices either of courts or of legislatures. The debate in the American law reviews is almost entirely theoretical; there has been no sustained attempt to review the outcomes of actual cases or the actual practice of legislatures under a post-Graetz approach.

In the United States, constraints on retroactive legislation can be found both in the federal Constitution and in the state constitutions. The constraints based in the federal Constitution apply both to Congress and to the state legislatures. In theory, these constraints should be applied the same at both levels. As noted below in the case of validation/curative statutes, however, the institutional position of the states and their subunits are sufficiently different that situations for which there no federal counterparts have emerged.

The constraints based in a state constitution apply only to the legislature of that state. Even though these state constitutional provisions may contain exactly the same language and can be traced to common sources, each highest court in a state is free to interpret these constraints independent of the interpretations of other courts, including the Supreme Court of the United States. This practice compounds the difficulty of stating conclusions regarding the meaning given in the United States to any particular language. The attitude toward retroactive tax legislation in the state courts is considerably more hostile in at least some instances than the attitude in the federal courts. Some of this difference may, however, reflect the fact that state legislatures tend to engage in more controversial legislative practices. (This is turn reflects the fact that most state legislatures are under considerably more onerous fiscal constraints than the federal government, including debt limitations and balanced budget requirements.) The responses in this questionnaire include these state practices (labeled 'subnational' and set at the margin) as examined under both federal and state constitutional limitations, but no assurance can be given that all state practices are reflected in these responses.

This report deals only with constraints on legislative actions. Very different assumptions about the legitimacy of retroactivity can be found with respect to with administrative actions. When the Internal Revenue Service (IRS) is acting in a quasi-judicial capacity by applying the law to a particular fact pattern, its correction of a previously mistaken determination does not purport to change the applicable law, and therefore, like a judicial interpre-

tation, is ordinarily given retroactive effect. *Automobile Club v. Commissioner*, 353 U.S. 180 (1957) (permitting retroactive revocation of a ruling holding taxpayer to be taxable as a non-taxable membership organization). Under the most commonly used letter ruling practice, however, the ordinary practice is to revoke with prospective effect only, in order to induce taxpayers to participate in this practice.

Until 1996 a similarly broad degree of discretion was permitted Treasury and the IRS in the promulgation of new substantive rules through regulations. E.g., *CWT Farms, Inc. v. Commissioner*, 755 F.2d 790 (11th Cir. 1985); *Dixon v. United States*, 381 U.S. 68 (1965) (permitting retroactive effect to the withdrawal of an acquiescence in an earlier unrelated case). New constraints were imposed by Congress in 1996 on the ability of Treasury and the IRS to announce positions with retroactive effect relating to statutes enacted after 1996. These statutory constraints on administrative decisions map considerably more easily into the distinctions made in this questionnaire. In general, the Treasury, in conjunction with the IRS, has authority to promulgate regulations interpreting legislative language. Although the circumstances under which courts must defer to administrative decisions are still not entirely clear, see *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. (2012), in general, the courts must defer to such regulations when the meaning of the statute is ambiguous.

Since 1998, however, 26 U.S.C. 7805 has prescribed the extent of retroactivity allowed in tax regulations as follows:

> "(1) No regulation will 'apply to any taxable period ending before the earliest of [certain] dates.' [These dates all deal with events that would provide taxpayers with notice of the regulation; that is, the date a regulation is filed with the federal register (apparently, even if it does not actually appear in that publication until several days later), the date on which a proposed version of the regulation was similarly filed, or the date on which 'any notice substantially describing the expected contents of any temporary, proposed or final regulation is issued to the public.'
> [Specific exceptions permit retroactivity only in the case of]
> (2) Regulations issued within 18 months of the enactment 'of the statutory provision to which the regulation relates'
> (3) Regulations to prevent abuse
> (4) Regulations 'to correct a procedural defect in the issuance of any prior regulation'
> (5) Regulations 'relating to internal Treasury Department policies, practices or procedures'
> (6) Regulations if authorized 'by a legislative grant from Congress authorizing the Secretary to prescribe the effective date with respect to any regulation'
> (7) Regulations if the regulation allows retroactive application only on the taxpayer's election."

Some of the tension between the judicial attitude toward retroactivity in legislation and the constraints imposed by Congress on federal tax authorities can explained by the institutional roles of the courts and Congress. A significant part of the tension may nevertheless be attributable to the differing institutional views regarding the legitimacy of retroactivity.

3.20.2. **Terminology**

3.20.2.1. **Retroactivity and retrospectivity**

In the United States there is no clear distinction made between 'retroactivity' (applying to a period before enactment, and thus formally retroactive) and 'retrospectivity' (effecting actions taken prior to enactment, and thus materially retroactive). Although in the United States, both

'retroactivity' and 'retrospectivity' may be used, 'retroactive' is by far the more common term and it is used to describe both a statute meant to have effect on a date prior to its enactment and to a statute that effects prior economic positions (including accrued but unrealized gains). In many contexts, the former may be more controversial than the latter.

The term 'retrospective' has no particular significance in the jurisprudence involving the power of the federal Congress to enact tax legislation that either is 'effective' as of a date prior to its enactment or alters the results of previously established economic positions. As discussed below in section 3.20.5, such 'retrospective' taxation of most types of income streams and many types of transactions would be uncontroversial. Thus, for instance, the various courts considering the application of a 1950 statute that effectively changed a the rate applicable to a payment received in 1964 as an installment on a sales contract closed in 1946 in *Picchione v. Commissioner*, 54 T.C. 1490 (1970), affd. 440 F.2d 170 (1st Cir. 1971), cert. denied, 404 U.S. 828 (1971), merely had to conclude that the result of the statutory change was not so harsh as to violate due process, without having to commit to the degree of retroactivity involved.

Although there is no technical significance to retrospectivity in taxation, legislatures are generally sensitive to it when entirely new taxes are enacted. Thus, the federal government upon first enacting an income tax, defined the base to avoid an extraordinary amount of 'retrospective' taxation of capital gains by setting the basis for measuring such gains at the fair market value at the time when the Sixteenth Amendment to the Constitution first came into effect permitting the enactment of the income tax in 1913. (Prior to that date, according to the opinion of the *Supreme Court in Pollock v. Farmers Loan and Trust*, 158 U.S. 601 (1895), Congress had no power to impose an income tax at least with respect to many types of income.)

This limitation was not so much the result of a Congressional view that, even had the power to tax such income been present, the retrospective nature of a tax on previously accrued gains would have made it unconstitutional, but an acknowledgment that prior to that date there may have been no power to impose an income tax, and that any attempt to reach prior accruals might be beyond the reach of its taxing authority.

Subnational. In several states (Colorado, New Hampshire, North Carolina, Tennessee) the state constitution expressly prohibits 'retrospective' legislation or legislation 'retrospective in operation; in several others (Georgia, Ohio, Texas) the prohibition is on 'retroactive' legislation.

Even in the states with specific constitutional provisions, no distinctions between the terms 'retroactive' and 'retrospective' are discernible in the case law discussing these prohibitions. See, e.g., *Shangri-la, Inc. v. State*, 113 N.H. 440 (1973)(tax on capital gain realized in March 1970, included in business profits tax first imposed in January 1970, although gain admitted to be economically accrued prior to January 1970 not 'retroactive' and thus not unconstitutional under NH provision); *Coley v. State*, 360 N.C. 493 (2006)(permitting, despite constitutional prohibition on 'law[s] taxing retrospectively sales, …or other acts previously done', an increase in income tax rates, in a statute enacted in September 2001, increasing rate on entire 2001 year).

Many states when enacting their separate income taxes similarly limited their effects, even if there was no obvious lack of power to tax such gains as they accrued earlier. See, e.g., *Cook v. Revenue Div. of Michigan*, 396 Mich. 176 (1976)(applying the Michigan rule, which allowed proportionate exclusion of gains accrued before but realized after enactment, to employer-sponsored savings accounts)

3.20.2.2. **Relevance of the tax period**

The legal discourse in the United States does not usually employ a conceptual distinction between actual retroactivity (that is, a provision that applies to a previous year) and de facto retroactivity (that applies as of the beginning of the current year).

In the United States both provisions could be called 'retroactive,' but, as above, there is generally no significance to using this label in determining the limitations on the power of Congress to tax. The labelling of a particular provision as 'retroactive' will not be determinative of its validity.

Despite the lack of formal distinction between these two types of retroactivity, de facto retroactivity is far more common and is generally completely uncontroversial, at least when the tax is directed at income or value and not on any particular transaction. Even when defined in terms of particular transactions, retroactivity within the year of enactment is likely to be viewed as benign. Indeed, a federal tax provision enacted in a later month having an effective date in an earlier month, that is, changing the results of transactions occurring earlier in the same year, is common. The Supreme Court has taken note of the phenomenon, see *United States v. Darusmont*, 449 U.S. 292, 297 (1981)(calling this a 'customary Congressional practice,' and permitting changes enacted in October 1976 to have effect on transactions after 1 January 1976). The practice dates at least to the first enactment of the income tax after the ratification of the Sixteenth Amendment, on 2 October 1913, retroactive to 1 March 1913, and was present in a multitude of congressional acts both before and after, see the instances listed in the dissent of Justice Brandeis in *Untermeyer v. Anderson*, 276 U.S. 440 (1928).

This practice is occasionally justified on the ground that the tax is on the overall income of the year, and 'income' is not final until the end of the taxable year. This justification has not been relied upon in modern cases scrutinized under federal standards; indeed, taxes enacted in a period after the close of the taxable year first affected have not been treated differently from taxes enacted within that year, e.g., *Welch v. Henry*, 305 U.S. 134 (1938) (Wisconsin statute enacted in 1935 affecting dividends paid in 1933).

Subnational. This distinction was relied upon in earlier state cases, in which the rationale was that a tax could be a *prospective* tax on the privilege of doing business, even if its measures included past events, e.g., *Oleson v. Borthwick*, 33 Haw. 766 (1939) (upholding inclusion in income tax base of dividends paid in 1934, upon change in law not occurring until 1935); *Neild v. District of Columbia* 110 F. 2d 246 (C. A. D. C. 1940). This logic seems to play an especially important role in those states with a stronger prohibition on retroactivity generally, e.g., *Coley v. State*, 360 N.C. 493 (2006)(permitting, despite constitutional prohibition on 'law[s] taxing retrospectively sales, …or other acts previously done', an increase in income tax rates, in statute enacted in September 2001, increasing the rate on the entire year of 2001) and in *General Dynamics Corp. v. Sharp*, 919 S.W.2d 861 (Texas 1996) (giving effect to, 'as not retroactive' an alteration in the formula for determining the corporate franchise tax to include a component based on earned surplus, which for this taxpayer included amounts under contracts begun eight years earlier, since a franchise tax is not 'retroactive' in violation of the state constitution simply because it 'draws upon antecedent facts' relating to prior years, so long as it 'pays for the privilege of doing business' prospectively'; also noting that even if tax was 'retroactive,' it is not impermissibly so since it does not impair vested rights). However, in at least one state with a stricter prohibition on retroactivity, this logic was not sufficient, *Lakengren v. Kosydar*, 44 Ohio St. 2d 199, 339 N.E.2d 814 (Ohio 1975)(holding impermissibly retroactive the application of a statute enacted 20 December 20, 1971, which added income as alternative measure in addition to net worth as a measure of the 1972 corporate franchise tax, as applied to income earned in taxable year ending Feb 1971)

3.20.2.3. **Interpretive statutes**

In the United States two very common practices (technical corrections and statutes purporting to clarify the originally intended meaning) might fall within the meaning of 'interpretative' statute. Only the first is explicitly acknowledged as a distinct practice. Neither has any

constitutional significance. Since the degree of permissible retroactivity under the federal Constitution is so broad, there is no special doctrine needed to justify these practices. Congress is far more likely, as a political matter, however, to enact such statutes than other provisions with either 'retroactive' or 'retrospective' effect.

Technical Corrections. The practice most common at the federal level is the enactment of 'technical corrections.' 'Technical corrections' would include (1) changes to statutes that contained clear errors in drafting, both in grammar and in effect and (2) language that was intended to be 'interpretative' in the common sense of clarifying the intent of the prior statute.

Technical corrections packages are fairly routine, enacted essentially after every major piece of tax legislation. They are by definition 'revenue neutral,' in the sense that they are enacted only to restore the expectations of the enacting Congress with regard to the original measure. They are also generally assembled as bipartisan legislation, agreed to by the relevant staffs and are likely to move through Congress without amendment.[1]

Clarification of intended meaning. A federal statute might purport to declare the meaning of a previously enacted statute, without fitting the generally understood meaning of 'technical correction.' Although such statutes are far less likely to be enacted than 'technical corrections,' they might be enacted in response to judicial interpretations, or, in rare cases, to positions taken by the government in litigation or in anticipation of litigation. Such a practice was approved by the Supreme Court in an early case, *Stockdale v. Ins. Cos.*, 87 U.S. 323 (1873) (in convoluted set of opinions, allowing 1870 tax on 1869 income of entities and generally approving of congressional acts interpreting prior legislation).

This was also the practice involved in *United States v. Wells Fargo*, 485 U.S. 351 (1989) (considering a statute enacted to reverse the decision of a trial court that interest paid on certain obligations was not subject to tax). In that case, however, the Supreme Court did not have to rule on the retroactivity issue because within the same case it reversed the substantive judicial decision that had led to the corrective statute. This change in judicial law rendered the corrective statute (referred to as a 'clarification' in the legislation itself) superfluous.

Early cases found limits on such interpretive legislation when it threatened to encroach on 'vested rights' defined in contracts with the state itself. E.g., *Koshkonong v. Burton* 104 U.S. 668 (1882)(giving effect to a statute that directed the use of the shorter of two possible statutes of limitation, but denying effect to one that would result in a lower interest rate paid on state bonds). But a taxpayer is ordinarily not treated as having a vested position in any statute setting forth a tax law, no matter how significant its economic impact. Therefore, there is no particular reluctance to enact provisions that endorse an administrative position already asserted by tax authorities despite the assertion of contrary positions by taxpayers. (However, Congress also may indicate in legislative history that no inference is intended as to the relationship of a new provision with an administrative position regarding prior law, see, e.g., *O'Gilvie v. United States*, 519 U.S. 79 (1996).) Nevertheless, Congress may acknowledge in an interpretive statute a difference between taxpayers who have clearly relied on the prior law and those who have not. Thus, in the statute involved in *Wells Fargo*, 485 U.S. 351 (1989), Congress honoured the exemption claimed by those who did not include the notes in question in their estate tax returns (many of whom had paid a premium on the expectation that the notes would be exempt from estate tax), even as it denied the refund claims of those who had included it in their returns.

The Congressional reaction to a recent rather notorious administrative pronouncement may help demonstrate the wide degree of latitude within which Congress may legally

1. See generally Mark Gerson, 'Technically Speaking: The Art of Tax Technical Corrections', 2007 *Tax Notes Today*, at pp. 44-35.

act, and the likelihood that its actions will be constrained more by politics than by law. On 30 September 2008 Treasury announced, claiming apparently to be acting under regulatory authority granted by Congress, that the limits on the survival of carryover operating losses when a business changes ownership would be applied in a very generous way to the financial industry. Legislation that was signed in February 2009 'clarified' that this announcement was outside of the authority previously granted. This legislation stopped short of entirely revoking the position in the announcement and provided that for deals in place before 16 January, the day on which legislation containing these provisions was introduced, the announcement 'shall be deemed to have the force and effect of law with respect to any ownership change.'

3.20.2.4. **Validation statutes**

'Validation statutes' are possible, but in general are not recognized as a distinct category treated as creating any special challenges under the federal constitutional standards regarding retroactivity. It is assumed that the primary distinction between the 'interpretative' statute that is the subject of question and the 'validation' statute here is the intervention of a judicial decision. These provisions, even when they reverse taxpayer victories, are permitted and will be given retroactive effect with respect to those cases for which a final judgment has not been entered. See, e.g., *New England Baptist Hospital v. United States*, 807 F.2d 280 (1st Cir. 1986), *Canisius College v. United States*, 799 F.2d 18 (2d Cir. 1986), cert. denied, No. 86-1187 (20 April 1987); *Temple University v. United States*, 769 F.2d 126 (3d Cir. 1985), cert. denied, 476 U.S. 1182 (1985).[2]

However, such statutes in general could not change the outcome of a case that had already been finally determined by a court and a final judgment entered. This prohibition stems not from a simple rule against retroactivity, but concerns for separation of powers that would render all such judicial interference with the final decisions of courts invalid, see *Plaut v. Spendthrift Farms*, 514 U.S. 211 (1995).

In a series of older cases, such validation or ratification was permitted in situations involving far more retroactivity than involved in most modern cases. For instance, in *Rafferty v. Smith, Bell & Co*., 257 U.S. 226 (1921), the Court allowed a curative act enacted in 1920 to legitimate tariffs collected in 1916 and subsequently held invalid, when litigation challenging such collection was still pending; in *United States v. Heinszen & Co*., 206 U.S. 370 (1907), the Court allowed a similar curative act enacted in 1906, ratifying a tariff collected between 1899 and 1902 for which courts had held there was no authority after the status of the Philippines changed on the ending of hostilities there.

In a dissent from a procedural order, Justice White indicated that this category may still have legal significance in *Van Emmerik v. Janklow*, 454 U.S. 1131 (1982), when he stated that 'The difficulty in discerning the difference between permissible curative legislation and unconstitutionally retroactive legislation is apparent from an examination of our case.' In this case a state court had upheld curative legislation enacted in 1981 that retroactively (re) imposed a sales tax initially erroneously collected in 1969 after that same state court had ruled that the original tax had been invalidly collected.

Congress recently had an opportunity to enact this type of curative tax legislation in a situation involving an enormous number of taxpayers, but declined to do so; in this particular case there is no public record of the reasons for its reluctance to act in this way. Over

2. For a survey of the Congressional practice in reaction to the decisions of the Supreme Court (perhaps significantly making no note of Congressional intent with respect to retroactivity) see Nancy C Staudt, Rene Lindstadt and Jason O'Connor, 'Judicial Decisions as Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954-2005', 82 *N.Y.U. L. Rev.* 1340 (2007), at pp. 1383-1394.

most of the twentieth century, an excise tax was imposed on 'long-distance' telephone service, with 'long distance' defined as service for which the rate charged was determined by duration of the call and distance. Beginning in the late 1980s telephone service providers began to charge a 'flat rate' for long distance calls – some such providers apparently understanding that in doing so they might avoid the excise tax. The government urged the courts to interpret the statute so as to permit continued collection for 'long distance' service even if the measure of the charge no longer fit the statutory description; the courts refused. Although Congress could have enacted an 'interpretative' provision (as described in the above question) when this problem first surfaced, see Rev. Rul. 79-404, 1979-2 C.B. 382 and GCM 37273 (ruling that the excise applied to certain maritime telephone service, despite the lack of fit with the statute), or a 'validation' provision, as that term is used here after the government began to lose in the district courts, it chose not to do so for reasons that do not appear in the public record. Instead, after the government lost numerous cases in the courts, the government granted refunds based on formulaic determinations rather than actual computations of amounts owed. The adequacy of this administrative limitation on remedies is still snarled in litigation. See, e.g., In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig., 539 F. Supp. 2d 281 (D.D.C. 2008), en banc hearing granted sub nom. *Cohen v. United States*, 599 F.3d 652 (D.C. Cir. 2010). Even now, Congress has failed to act, apparently because the political stakes are difficult.

*Subnational***.** In practice in the states, a distinction may be made between those 'validating' or 'curative' provisions which redefine liabilities in ways that would have been clearly within the power of the taxing body if enacted or properly assessed at the earlier time, and those which purport to grant power (for instance, to a more local unit of government) that has been determined not to have been present at the earlier time. *Zaber v. City of Dubuque*, 789 N.W.2d 634 (Iowa 2010) (noting the distinction in other jurisdictions, but indicating that both were equally valid in Iowa, and that when a longstanding local tax is ratified by the state legislature a higher degree of retroactivity will be permitted than when an entirely new tax is enacted, relying in part on the difference between granting refunds and foregoing future revenues); *IEC Arab Ala., Inc. v. City of Arab*, 7 So. 3d 370 (Ala. 2008) (allowing the1997 alteration of measure of use tax to close retroactively to the1994 judicially expanded gap in sales/use tax base after change in federal commerce clause limitations rendered the earlier tax invalid); *Gautier v. Crescent City*, 138 Fla. 573 (1939)(permitting retroactive validation of faulty real estate tax assessment). Such attempts at curative legislation may be partially blocked by limitations on a state legislature's ability to affect the outcomes of pending, not just final, cases. See, e.g., *Jefferson County Comm'n v. Edwards*, 2010 Ala. LEXIS 85 (14 May 2010).

3.20.2.5. **Comparison moment**

Taxing statutes in the United States frequently involve effective dates that differ from the date upon which the statute enters into force. Federal statutes ordinarily become law or 'are enacted' (and thus 'enter into force') immediately upon the final act prescribed by the Constitution (generally signing by the President, a vote to override a Presidential veto of a bill passed by both the House and the Senate, or the passage of time without Presidential action). No additional act of publicity is required. See generally *United States v. Will*, 449 U.S. 200 (1980)(reviewing those circumstances in which a statute can be presumed to have become effective from the beginning of the day it is signed and those circumstances in which it will not be treated as effective until the time it is actually signed).

The relationship of such dates to the effective date of the statute has no special legal significance. As noted in section 3.20.2.2 above, tax statutes are regularly 'enacted' with 'effective dates' that are several months earlier, and sometimes enacted with 'effective dates' that are dates before the beginning of the current calendar year.

Although a bill will become 'enacted' and 'enter into force' as a 'public law' under the above procedure, particular sections of such laws frequently will have separate effective dates. These effective date provisions can be very detailed, with very different rules applying to different situations. Although these rules will almost always be stated in seemingly general terms (e.g., [this provision will not apply to] contracts that became binding before [specific date], they frequently have been written with the specific circumstances of specific taxpayers in mind. These special transitional rules will frequently be found only in the 'statutes at large' and will not be included in the codified versions of the statutes. (This legislative procedure is different from the 'private bill' procedure, through which very rarely special exceptions to the general application of tax provisions can be made.)

*Subnational***.** Many states have special constitutional limitations on the date on which statutes may enter into force, with, for instance, different procedures and majority requirements for statutes that are to have an effective date before they enter into force. Even in these states, this distinction does not seem to affect the legislature's ability to impose a tax with an early effective date, so long as the special limitations on such legislation generally are met. E.g., *Homestake Mining Co. v. Johnson*, 374 N.W.2d 357, 363-64 (S.D. 1985) (holding that despite a provision requiring a supermajority in order to have a statute enter into force before 90 days after its passage, there need be no supermajority to have a statute that does not enter into force until that time require a report that takes into account taxable activity prior to that time; *Mecham v. State Tax Comm'n*, 17 Utah 2d 321(1966)(holding that a statute that could not 'take effect' until 11 May 1965, could nevertheless set rates for taxable years beginning 1 January 1965).

3.20.2.6. **Concept of retrospectivity**

As noted above, since the conclusion that a tax statute is 'retroactive' or 'retrospective' has no legal significance in itself, there is no single definition or set of criteria used to distinguish such statutes. The most commonly articulated test applied to statutes to determine their invalidity in light of their impact on prior commitments is whether they are 'harsh and arbitrary,' many statutes that are described as 'retroactive' will pass muster under this test. As described further in section 3.20.5, the Supreme Court of the United States has not found any statute invalid because of its retroactive effects since 1930, and even before that, only in a few very limited contexts.

The literature in the United States recognizes that any change in taxes will affect the value of commitments and investments in place at the time. It is generally well-accepted that changes such as changes in the rate at which unrecognized gains would be taxed and changes in the rules affecting the ability to offset future items of loss against future items of gain of a slightly different sort are within the legislature's power. Therefore, the question for courts examining legislation under the federal standards regarding retroactivity is not whether the statute is retroactive or retrospective, but whether the operation of that statute is so harsh or arbitrary that it violates due process. (See section 3.20.5 below for further discussion of this standard.)

Somewhat more controversial is the ability of the legislature to change the terms of tax legislation that has been enacted in order to induce particular behaviour. Congress rarely withdraws the benefits it has expressly provided through such legislation, so it is difficult to conclude what the reaction of the courts would be. The only case in which the modern Supreme Court has held that Congress enacted a statute that was invalid because of its retroactive effect involved a statute that the Court viewed as having attempted to alter the terms of a binding contract. See the discussion of these cases in the answer to section 3.20.5 below.

Subnational. Even in those states whose constitutions contain express limitations on 'retroactive' or 'retrospective' legislation, it is difficult to ascertain a particular standard

applied in assigning these labels. (One aspect of the problem seems clear: there is very little discussion of these questions outside of judicial opinions, and if the legislature in a particular state, adhering to its view of its constitution, does not enact arguably retrospective tax measures, the courts never opine upon them.) Thus in *Martin v. Board of Assessment Appeals*, 707 P.2d 348 (Colo. 1985) the court allowed effect to a statute passed in mid-1982 to alter the assessment of a newly converted condominium property as of 2 January 1982, and in doing so hinted that a deviation in the way an old tax was administered could be different from new tax; but the court then went on to indicate that its view would not be substantially different from results in jurisdictions with no express limit on retroactivity.

Some noteworthy situations in which state courts have denied that legislation had retroactive effect have arisen when a state imposes a tax measured almost entirely by the amount of income shown on a federal tax return. In some such cases, the courts have simply ignored the fact that the amounts shown on the federal return may reflect past events. Thus, in *Tiedemann v. Johnson*, 316 A.2d 359 (Me. 1974) the state court held that the use of the federally reported adjusted gross income resulted in a tax that was 'wholly prospective,' even though the federal amount included gains on real property resulting from installment sales which had occurred before the enactment of the state income tax. *Marco Associates, Inc. v. Comptroller of Treasury*, 265 Md. 669 (1972)(essentially same as *Tiedeman*).

In *Couchot v. State Lottery Comm'n*, 74 Ohio St. 3d 417 (1996) the court allowed application of a statute enacted on July 1, 1989 extending the state income tax to cover payments received after that date by a non-resident who won the lottery in March 1988, despite a state constitutional prohibition on 'retroactive laws.'

3.20.2.7. **Distinctions between substantive and procedural statutes**

A formal and strict distinction between substantive and procedural retroactivity is made only with respect to the criminal law, where a constitutional prohibition on ex post fact laws, generally limited to substantive provisions, is very strictly adhered to.

Therefore there is no clear distinction between substantive and procedural rules that would apply to tax rules enacted by Congress. The tolerance for relatively high degrees of retroactivity in mere procedural changes is, however, likely to be even greater than that in changes in substantive liabilities. Cf. *McGehee Family Clinic, T.C. Mem.* 2010-202 (allowing the imposition of a penalty for failure to follow filing procedures enacted after transaction was entered into but before filing was required, and resisting labelling this effect as 'retroactive'). (The distinction between substantive and procedural rules may apply to tax rules promulgated by the Internal Revenue Service and Treasury, since such a distinction is provided for by statutes under which such rules are promulgated).

*Subnational***.** Although the starkest case found was one in which the retroactive application favoured the taxpayers, *Illinois C. R. Co. v. Wenona*, 163 Ill. 288 (1896)(requiring retroactive application of statute that afforded taxpayers subject to special assessment the right to a jury trial on the question of whether the benefit to the payer adequately justified the assessment), in general states will allow retroactive application of changes in tax procedures**.** Even those states which take relatively restrictive approaches to retroactive taxes appear more willing to accept retroactive procedural or 'remedial' changes, e.g., *Woodmoor Imp. v. Property Tax Adm'r*, 895 P.2d 1087 (Colo. App. 1994) (giving effect to a provision that reduced the period in which claims challenging assessments could be made from six years to two); *Smith v. Davis*, 426 S.W.2d 827 (Texas 1968) (taxpayer has no vested right protected by the state prohibition on retroactive laws in a statutory provision in effect at the time a referendum approved a public project requiring that changes in property tax rates to fund that project be approved by voters). State ex rel. *City of South Euclid v. Zangerle*, 145 Ohio St. 433, 62 N.E.2d 160 (1945) (there is no vested right in an existing method or procedure for collection of taxes and assessments).

It is not clear whether retroactive limits on the time at which interest on refund will begin running will be viewed as merely 'procedural.' *Revenue Cabinet v. Asworth Corp*., 2009 Ky. App. LEXIS 229 (Ky. Ct. App. 20 November 2009), cert. denied, 131 S. Ct. 1046 (2011) (giving effect to a statute that shortened the period during which interest ran and reduced the rate paid, without discussion of the nature of the right to interest on refunds) See the references in section 3.20.6 regarding the retroactivity of case law and refund remedies.

3.20.3. *Ex ante* evaluation of retroactivity

3.20.3.1. Constitutional limitations

The US Constitution contains only one provision that expressly forbids retroactive legislation, Article I, Sec. 9, cl. 3 provides that 'No…ex post facto law shall be passed.' This provision has been held to apply only to criminal proceedings, and thus not to ordinary tax matters, or more generally, to 'economic legislation' of broad application. Two other provisions are relied upon by those challenging retroactive tax legislation, the fifth amendment ('No person shall be … deprived of life, liberty, or property without due process of law') and the contract clause (Article 1, Sec. 10, cl.1.)(These two provisions are literally applicable only as a limitation on the federal government, but have been incorporated through the Fourteenth Amendment to apply to the states.

Subnational. All states are subject to the due process clause in the Fourteenth Amendment of the federal Constitution. The authorities developed under this provision have been considered throughout this questionnaire as 'federal' authorities. Every state also has its own equivalent of a 'due process' clause, and most have 'ex post facto' and 'contract' clauses. Rarely are these provisions found by modern courts to have content different from their federal counterparts.

As noted above, several states have provisions specifically restricting retroactive civil legislation. In Colorado, Missouri, New Hampshire, Tennessee the state constitution expressly prohibits 'retrospective' legislation; in North Carolina the proscription is on 'retrospective tax' legislation particularly. In Georgia, Ohio, and Texas the prohibition is on 'retroactive' legislation.

3.20.3.2. Transition policy of government

The terms of transition policy with respect to tax changes are the sort of guideline that would ordinarily be dealt with as an internal rule of Congress; Congress has never articulated a general rule. The leadership of each Congress is free to set this type of rule, and frequently does so; for instance, specific rules are prescribed relating the effect of tax changes on the deficit (so-called 'Pay-go' rules), but no Congress had adopted a specific restraint on retroactivity. [3]

On occasion, when a major reform effort is undertaken, Congressional leaders will signal, albeit perhaps vaguely, their intentions about the degree of retroactivity anticipated. Thus, in a speech to the Economic Club of New York in February 1985, House Ways and Means Chairman Dan Rostenkowski in anticipation of the process that would lead to the Tax Reform Act of 1986 stated:

'The price of reform must be affordable. No one sector should be crippled by the elimination of present breaks. No person should be penalized tomorrow for doing something that's perfectly permissible today.

3. For more on this type of rule, see Elizabeth Garrett, 'Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process', 65 *U. Chi. L. Rev.* 501 (1998).

The transition from the old code to the new code must be without abrupt and arbitrary changes. Transitional rules will be a major concern in drafting.'[4]

Shortly thereafter, this position was affirmed in a joint statement with Rostenkowski's counterpart in the Senate.[5]

Subnational. No similar policies at the state level were encountered in this research, but the research was not exhaustive.

3.20.3.3. **Transition policy and favourable retroactive treatment**

The general interpretive presumption against retroactive application of changes applies to taxpayer-favourable changes. No specific policies granting or denying retroactive effect to tax statutes that are favourable to taxpayers were identified, cf. *City of New York v. Permanent Mission of India*, 618 F.3d 172 (2d Cir. 2010) (giving retroactive effect to a federal change granting an exemption from local property taxes) except in the increasingly common federal legislative practice of extending lapsed provisions that benefit taxpayers on a retroactive basis. See section 3.20.4.4 below.

Subnational. In some states, however, such practices can raise problems if they are viewed as 'gifts of public property' to the taxpayers benefitted. Cf. *Preston v. State Bd. of Equalization*, 25 Cal. 4th 197 (2001)(court gave retroactive effect to a statute 'clarifying' prior law so as to undo the effect of judicial decision which retroactively benefited the taxpayer and thus would make a gift of public funds)

3.20.3.4. **Ex ante control by an independent body**

In the United States, at the federal level, there is no means by which Congress may obtain an advisory opinion from the Supreme Court, and there is no other authoritative institution.

Subnational. Such procedures are available in some states, and can be used both to determine whether the court would interpret the legislation to have retroactive effect and whether such legislation was impermissibly retroactive. See, e.g., Opinion of Justices, 370 A.2d 654 (Me. 1977)(ruling that a submitted initiative that if passed, would void a legislatively enacted local tax, would not be interpreted to have retroactive effect); Opinion of the Justices (Current Use Reimbursement Program), 137 N.H. 270 (1993)(holding invalid as impermissibly retrospective under New Hampshire's relatively strict express prohibition, a change in the penalty for change of use under a favourable 'current use' property tax scheme).

3.20.4. **Use of retroactivity in legislative practice**

3.20.4.1. **Legislating by press release**

Is 'legislating by press release' used in your country to provide an effective date as of a date earlier than the date of statutory enactment?

Congress will frequently use a date prior to the enactment date of legislation as the limit of the extent to which the substantive provisions will be retroactively applied. Various dates may be used, including

4. Tax Notes, 26 February 1985.
5. Tax Notes, 25 March 1985.

'– a date connected to an administrative pronouncement, or
– a date with significance in the legislative process including
– a presidential budget message,
– a committee announcement or press release,
– the introduction of a specific bill,
– the release of a committee report,
– the date a bill is passed by both houses,
– the date a conference agreement is reached,
– or the date of enactment itself.'[6]

The courts have not expressly relied upon these earlier announcements in determining the degree of retroactivity to be permitted, although in the leading case allowing retroactive application of tax legislation, *United States v. Carlton* (1994), the Court recited that such announcements had been made. The extent of retroactivity was relatively small given this announcement (retroactive to October 1986, from an administrative announcement in January 1987 warning of legislation introduced in February 1987 and finally enacted in December 1987, but the behaviour of the taxpayer affected by the retroactivity had already occurred (in December 1986).

3.20.4.2. **Retroactive effect further back than first announcement**

Although the relationship between the date of first announcement of a proposed provision and the date at which it is first effective will be relevant to whether the result is so 'harsh and arbitrary' as to violate due process, it will only be one of the various factors considered.

The classic list of accepted federal practice has changed little from this 1960 summary:

"– Legislation is commonly made retroactive to the beginning of the year of enactment. At times, too, there are provisions enacted shortly after the end of the first year to which they are retroactively made applicable.
– Provisions which are nominally prospective only will frequently have future application to transactions irrevocably entered into years previously. In contrast, Congress will at times exempt situations entirely when before the date of enactment, transactions had been completely culminated or even where only binding contracts or other commitments had been made.
– Retroactivity may be employed to eliminate a 'loophole' or 'unintended benefit,' although even here – depending upon the egregiousness or the revenue loss at stake – Congress leans towards post-enactment application.
– Retroactivity is at times adopted to correct technical errors in prior legislation – 'technical,' 'clerical,' 'typographical,' or 'grammatical' errors. Related to this is the so-called 'clarifying' amendment, made to 'reflect' a supposed 'Congressional intent,' which is usually made retroactive but may be made prospective when doubt exists about the meaning of the prior law.
– Mention should also be made of legislation which confers a benefit on taxpayers or corrects hardships inadvertently created in previously enacted legislation. Here retroactivity is generally considered unobjectionable, although recognition must be given to the cost-shifting effect of the overall burden on other taxpayers."[7]

6. See generally Testimony of Mortimer Caplin, former IRS Commissioner, Hearings Before the Subcommittee on the Constitution, Committee on the Judiciary, United States Senate, 15 April 1996 available at Tax Notes, April 16, 1996.
7. Laurens Williams, 'Retroactivity in the Federal Tax Field', 12 *U.S.C. Law School Tax Inst.* 79 (1960).

3.20.4.3. **Pending legal proceedings**

There are no established modern guidelines for determining when Congressional acts should interfere with pending legal proceedings, except for the general rule that, because of separation of powers concerns, Congress cannot act to undo the result of a final judgment for which all legal proceedings are finished.

Early cases allowed Congress to affect the outcome in pending cases through the enactment of retroactive legislation, e.g., *United States v. Heinszen & Co*., 206 U.S. 370 (1907) (holding valid a curative act enacted in 1906, ratifying a tariff collected between 1899 and 1902 for which courts had held there was no authority after the status of the Philippines changed on the ending of hostilities), but see *Forbes Pioneer Boat Line v. Board of Comm'rs*, 258 U.S. 338 (1922)(holding state legislature could not ratify illegally collected tax after final judgment holding such exaction illegal, although unclear whether judgment was result of presence of final judgment, after which the legislature could no longer act, or the pure retroactive nature of tax). See section 3.20.2.4 above, regarding curative legislation.

3.20.4.4. **Favourable retroactivity**

Favourable retroactivity is common when, as part of the income tax, Congress enacts 'extender' legislation after a provision that was subject to sunset has expired. For instance, the Tax Extenders and Alternative Minimum Tax Relief Act of 2008 (dealing with a wide variety of incentive and special relief provisions) was not enacted until October 2008, but was effective for tax years beginning after 31 December 2007. This practice is not distinguishable from that in which the provisions with similar retroactive effect are unfavourable.

3.20.5. **Ex post evaluation of retroactivity (in case law)**

3.20.5.1. **Testing against the Constitution and legal principles**

In the United States both the federal courts and the state courts have the authority to, at the behest of litigants, test the retroactivity of a statute for compatibility with the federal Constitution. It is generally accepted, as one might infer from the answers above, that the Supreme Court of the United States has the final word on the degree of retroactivity that would be permissible under the due process clauses of the federal Constitution, as they apply both to Congress and to the state legislatures. The highest courts in the several states will have final word on the degree of retroactivity permitted to the state legislatures under the distinct provisions in each state constitution.

3.20.5.2. **Examination method. Restraints on retroactivity based on the federal Constitution**

a. In general

There are technically two strains of *federal* constitutional doctrine that might be relied invoked to limit the enactment of retroactive taxes. The first involves potential limits on the power of the federal Congress to impose retroactive taxes, primarily under the Fifth Amendment's command that property not be taken by Congress without Due Process of Law, but also under the 'contract clause.'

The second involves the potential limits under the Fourteenth Amendment on the state legislatures' ability to impose taxes. In modern practice the two lines of Supreme Court authority based on federal law are generally viewed as one. Both strands involve interpretation of essentially the same language and, in general, have involved the same type of review.

However, because the federal government and the states are subject to substantially different limitations on their taxing powers and because the procedures according to which taxpayers may invoke the power of courts to challenge taxes, the overall pattern of the cases historically has been somewhat different. As further described below, in several instances, the Supreme Court has disallowed that the actions of state legislatures attempting to remove taxpayers' rights to pursue refunds in the same way that a curative statute might have allowed.

Note that in the analysis that follows, the distinction between cases involving 'simple retroactivity' and 'validation/curative' provisions is made entirely for ease of comparison; the distinction is rarely if ever made in a way that affects the outcome of cases. The distinction between these two types of retroactivity and retroactivity that 'impairs contracts' is a significant legal distinction, but the latter will depend upon the presence of a binding mutual contract and not on mere reliance.

b. Federal constitutional limitations on Congressional acts: simple retroactivity

There is no modern opinion of the Supreme Court holding an Act of Congress unconstitutional solely as a result of its retroactive effect. In general, the Court has indicated that the retroactive Congressional acts will be permitted so long as they serve a 'legitimate legislative purpose furthered by rational means.' No special standards apply to retroactive tax provisions as such.

Those cases in which challenges have been raised have never, however, dismissed the possibility that a tax provision could be invalid because of its retroactive effect. This possibility has arguably led to restraint on the part of Congress to avoid objectionable retroactivity.[8]

The more significant of these cases, and the language used therein, include:

In *United States v. Carlton* (1994), the Court gave effect as of October 1986 to a statute enacted in December 1987, announced January 1987 for which legislation introduced in February 1987, which removed the tax benefit associated with a transaction undertaken by an estate in December 1986, for transfer tax relating to a death that occurred December 1985. The amendment was accepted by the Court as curative, given the legislation history of both the original 1986 provision and the later act, although that characterization arguably not determinative.

The majority opinion articulated the standard to be applied: The due process standard to be applied to tax statutes with retroactive effect, therefore, is the same as that generally applicable to retroactive economic legislation: 'Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.'

Justice O'Connor, concurring, stated: 'The governmental interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and repose. … In every case in which we have upheld a retroactive federal tax statute against a due process challenge the law applied retroactively for only a relatively short period prior to enactment.'

In *United States v. Hemme*, 476 U.S. 558 (1986), the Court allowed a statute signed 10/4/86 to limit the ability to claim unified credit for estate and gift taxes, where the limit applied to those making gifts in the month before new provisions enacted and limit intended to block double benefit such as that hoped for in case. The case provides little in the way of interesting insight, since its reasoning was largely that the estate paid no more tax as a result of the change than it would have without it – the retroactive feature of the

8. For a summary of the modern cases, see Charlotte Crane, 'Constitutional Limits on the Power to Impose a Retroactive Tax', in: *Blessings of Liberty: The Constitution and the Practice of Law* (1988).

legislation had simply meant that the taxes were more than they would have been if there had been no retroactive feature.

In *United States v. Darusmont*, 449 U.S. 292 (1981), the Supreme Court permitted legislation enacted in October 1976 to apply to tax years beginning anytime in 1976 in the threshold for determining when an alternative base and rate would apply. In language far more permissive than that used in *Carlton*, it indicated that the mere fact that an increase in tax rates was made retroactive would rarely constitute a violation of the due process clause. According to the Court:

'Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute.'

The Court included three criteria which other courts have interpreted as indicative of the situations in which retroactivity might not be permitted:

Namely, whether the taxpayer could have altered his behaviour to avoid the tax if it could have been anticipated by him at the time the transaction was effected; whether the taxpayer had notice of the tax when he engaged in the transaction; and whether the tax is a new tax and not merely an increase in the rate of an existing tax.

In only one set of cases has the Supreme Court held that simple retroactive taxes imposed by Congress are invalid; in these cases the result was held to be a denial of due process. These cases all involved the imposition of new estate or gift taxes that applied to transfers occurring before the effective date of the statute. The modern federal estate tax was not enacted until 1916; the modern gift tax component – extending the transfer tax scheme to gifts not made in contemplation of death – was not permanently enacted until 1932, but it was temporarily introduced in 1924, and was repealed within two years. Because this line of cases is the sole authority for denying effect to retroactive tax legislation based on the limitations contained in the due process clauses in Article I and in the Fourteenth Amendment, these cases are very frequently cited. Therefore, it may be helpful to provide more detail about these cases, in the order in which they were taken up by the Court:

In *Nichols v. Coolidge*, 274 U.S. 531 (1927) the Court held that an inter vivos transfer (not in contemplation of death) to a trust in 1907, the corpus of which was to be distributed at the settlor's death could not constitutionally be subject to a tax enacted by statute effective 19 February 1919 (called the Revenue Act of 1918), since such a tax would be so arbitrary and capricious as to amount to confiscation under the Fifth Amendment. In this case, the Court's opinion made much of the fact that the property actually included in the decedent's estate would bear the burden of a tax measured by property over which the executor's of the estate would have no control, since they would have no control under state law of the previously settled property.

In *Blodgett v. Holden*, 275 U.S. 142 (1927), the Court evenly divided in a case considering the effect of the June 1924 enactment of a [by then known to be temporary] gift tax first introduced in Congress in February 1924 on gifts made in January 1924. An opinion in which four of the justices joined held that the tax was arbitrary ('It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing.'); in a second opinion the other four justices thought the taxing statute inapplicable to the gifts in question.

In *Untermeyer v. Anderson*, 276 U.S. 440 (1928), the Court held that the retroactive provision of the gift tax of the Revenue Act of 1924 [again, by then known to be temporary] enacted 2 June 1924 was invalid as applied to a gift made on 23 May 1924 (at which date the

ultimate enactment was all but certain, that is, the conference between the House and Senate to reconcile deviations between the legislation by those two houses had been held, and all that remained was ratification by the two houses of the conference agreement and a presidential signature). In a strident dissent, Justice Brandeis listed in detail the many prior federal tax statutes with far more retroactivity than was present in this case, as well as several instances of similar retroactivity in foreign jurisdictions.

The anomalous nature of the *Untermeyer* result was made clear only a few years later, when in *Milliken v. United States*, 283 U.S. 15 (1931), it was held that a February 1919 change in the rates could apply to a December 1916 transfer made in contemplation of death: 'a mere increase in the tax, pursuant to a policy of which the donor was forewarned at the time he elected to exercise the privilege, did not change its character.' There were no dissents.

These cases were effectively dismissed by the majority of the Court (but not by the dissent) in *Carlton*:

These cases were decided during an era characterized by exacting review of economic legislation under an approach that 'has long since been discarded… To the extent that their authority survives, they do not control here.'

c. Federal constitutional limitations on Congressional action: invalidations and cures

Congress has not enacted any provisions that have either attempted to cure defective tax collections, or attempted to block taxpayers' attempts at refunds for improperly collected taxes, so there are no modern cases looking at the possible limitations that might apply. It is clear, however, that the separation of powers doctrine prevents Congress from interfering with a judgment once it is final. Cf. *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995).

d. Federal constitutional limitations on Congressional action: alteration of tax consequences in breach of contract

In *United States v. Winstar*, 518 U.S. 839 (1996), the Supreme Court held that the government, because of the existence of an implied duty of fair dealing, cannot alter a regulatory treatment that was the object of a contract between the regulated party and the government. (The standard that it used to determine that the contract term in question was material is not clear, and the case is in many respects sui generis.) In a series of cases involving essentially the same contracts, the federal courts have treated the tax treatments claimed to have been promised as unsusceptible to even congressional change. See, e.g., *Centex Corp. v. United States*, 431 F.3d 1342 (Fed. Cir. 2005); *Nat'l Australia Bank v. United States*, 452 F.3d 1321 (Fed. Cir. 2006); *Local Okla. Bank v. United States*, 452 F.3d 1371 (Fed. Cir. 2006).[9]

e. Federal constitutional limitations on state legislative actions: simple retroactivity

The Supreme Court of the United States has been just as unwilling to interfere with the imposition of retroactive state taxes it has been to interfere within the enactment of retroactive federal taxes. In only one case, decided in the same era as the case involving retroactive federal taxes cited above, *Coolidge v. Long*, 282 U.S. 582 (1931)(four justices dissenting) was a state tax on successions held invalid because of its retroactive nature, here, with the Court citing under both the due process clause of the Fourteenth Amendment and the contracts

9. A good entry into the relationship between the contract clause doctrines involved in *Winstar*, the general due process limitations on retroactive taxation, and the other limits on governmental takings of private property can be found in the pamphlet prepared by the Congressional Research Service, Retroactive Taxation of Executive Bonuses: Constitutionality of H.R. 1586 and S. 651, CRS (25 March2009) (analysing legislation that would impose taxes on those businesses receiving stimulus package bailouts and paying bonuses). See generally Daniel S. Goldberg, 'Government Precommitment to Tax Incentive Subsidies: The Impact of United States v. Winstar on Retroactive Tax Legislation', 14 *Am. J. Tax Policy* 1(1997); Charlotte Crane, 'Honoring Expectations about Taxes: Are Roth IRAs Different?' (manuscript available on SSRN).

clause (apparently treating the establishment of a trust as a 'contract' with the state). This case involved the same gift as that involved in *Nichols v. Coolidge*; the state tax was held invalid because it was deemed to be a tax on a succession to a gift completely vested (both through the establishment of the trust in 1907 and in the relinquishing of the settlors' rights in the trust in 1917) before the 1921 enactment of the taxing act or of any other law taxing successions received by lineal descendants of the donor. The anomalous nature of this case seems apparent in light of the decision in *Welch v. Henry*, 305 U.S. 134 (1938) (Roberts, McReynolds and Butler dissenting) in which a change in the Wisconsin income tax enacted in March 1935 was allowed to operate on a dividend received in 1933.

f. Federal constitutional limitations on state legislative actions: ineffective cures

In *Forbes Pioneer Boat Line v. Board of Comm'rs*, 258 U.S. 338 (1922) the Court held that a state legislature could not ratify an illegally collected tax after final judgment holding such exaction illegal, although it is unclear whether the judgment was the result of the presence of a final judgment or the pure retroactive nature of tax. A review of the cases that have been decided by state courts reveals a conflict within the state courts regarding when curative actions will be barred by either the federal or the state constitutions.

In a closely related context, however, the Supreme Court has been very hostile to attempts by state legislatures to limit the fiscal effect of judicial opinions holding state taxes invalid. This is a far greater concern for states than for the federal government, because there are many more restrictions on the powers of states to impose taxes. Some of these restrictions are based in constitutional law that may evolve over time, leaving a large amount of previously collected revenue subject to claims for refund. In a series of cases, the Supreme Court intimated that it will not accept prospective applications of decisions invalidating state taxes, at least if the state does not provide a method of challenging the tax before payment. *Newsweek, Inc. v. Fla. Dep't of Revenue*, 522 U.S. 442 (1998), *Reich v Collins* 513 US 106 (1994); *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18 (1990). Although in all three of these cases the Court's language suggests that it believed the states in question had acted in bad faith by changing the remedies available to the taxpayers, the full import of this line of decision has yet to be fully understood. See, e.g., Ex parte *Surtees*, 6 So. 3d 1157 (Ala. 2008)(refusing to block taxpayer suits); *E.C. Garcia & Co. v. Ariz. State Dep't of Revenue*, 178 Ariz. 510 (1993)(legislature cannot change terms of refund suits for pending claims).[10]

g. Federal constitutional limitations on state legislative actions: alteration of tax consequences in breach of contract

No relevant authorities were found involving the invocation of federal standards to hold a state legislative action removing a tax benefit to involve a breach of contract. Since the finding of constitutionally protected contractual rights in this context is extremely difficult, it is likely that litigants rely on other, probably more favourable limitations derived from state constitutional provisions.

Subnational. Restraints based on the state constitutions on simple retroactivity. It should be noted, furthermore, that many state constitutions either have provisions that clearly impose stricter limits on tax retroactivity than the limits imposed by federal Constitution, or have similar 'due process' provisions that have been interpreted by the state courts to impose more stringent limitations. So long as the appropriate state court does not purport to be relying on federal precedent in interpreting similar language, it is free to interpret language similar to the federal language as imposing a greater constraint on its legislature; there is no imperative for uniform interpretation of similar language across state constitutions. A

10. See generally John Coverdale, 'Remedies for Unconstitutional State Taxes', 32 *Conn. L. Rev.* 73 (2000).

thorough examination of all of the relevant precedent would, therefore, require a separate set of answers for each of the 50 states, and perhaps for the several other distinct territorial jurisdictions. The cases included here are only examples and do not represent an exhaustive survey of possible cases.

Examples of cases finding retroactivity invalid, and which are most in tension with the federal (lack of) restraint include:

Oberhand v. Director, 193 N.J. 558 (2008)(as matter of 'manifest injustice' a plurality refused to apply a retroactive reduction in the deduction for transfers to a spouse under the estate tax, where decedents had died between the effective date of federal statute and the date of a state enactment 'decoupling' the state provisions from the new federal).

Rivers v. State, 327 S.C. 271 (1997) (purporting to apply the federal standards articulated in *Carlton*, but holding that 1991 denial of refund enacted in 1989 to remove retroactive capital gains tax enacted in 1988 and relating to 1987 violated the state due process clause).

Cagan's, Inc. v. Dep't of Rev. Admin., 126 N.H. 239, 249, 490 A.2d 1354, 1361 (1985) (tax on sales from vending machines would be impermissibly retrospective under New hampshire's specific prohibition if a regulation dated 15 October which removed exemption that was admitted by the court to be erroneous were allowed to apply to sales transactions which occurred prior to 15 October).

Clarendon Trust v. State Tax Com., 43 N.Y.2d 933 (1978)(holding invalid a 1973 statutory change, conforming the treatment of trust capital gains with changes made in 1972 increasing the taxation of individual capital gains, despite evidence, including publications for taxpayer use, indicating 1973 statute was correcting an error)

People ex rel. *Beck v. Graves*, 280 N.Y. 405 (NY Ct. App. 1939)(holding that a statute including in income rentals relating to mineral property outside the state made such rentals taxable for the first time, and thus was not 'clarifying', and given its purported 19-year retrospective reach, was 'unreasonable, arbitrary, capricious and palpably unjust.'

Examples of holdings finding retroactivity valid, but suggesting justifications for allowing retroactivity that would be unnecessary under the approach used in applying the federal standards include:

Brink Elec. Constr. Co. v. Dep't of Revenue, 472 N.W.2d 493 (S.D. 1991)(holding that since 1988 legislation only clarified ambiguities about whether 1984 and 1979 statutes imposing a gross receipts tax applied to contracts with federal and state government, the 1988 act could be applied retroactively to contracts granted in 1987)

Martin v. Board of Assessment Appeals of State,707 P.2d 348 (1985) (despite Colorado's prohibition on legislation 'retrospective in operation,' allowing a 3 May 1982 change in the factors to be taken into account in assessment of property for tax years beginning 1 January 1982); *American Refrigerator Transit Co. v. Adams*, 28 Colo. 119, 63 P. 410 (1900)(allowing April 1897 legislative change to operate retrospectively with respect to property taxes for moveable property in 1897)

Examples of state cases finding no limitation on retroactive taxation include:

Stanley v. Gates, 179 Ark. 886 (1929)(giving effect to tax enacted in 1929 on incomes earned in 1928); *Du Laney v. Continental Life Ins. Co*., 185 Ark. 517(1931)(allowing a tax rate increase on gross insurance premiums paid in same year as, but before effective date, although admitting 'retroactive' nature of tax).

Subnational. Restraints based on the state constitutions on validations and cures. State courts have been pressed harder to allow validation and curative statutes, and, in general, have allowed rather dramatic retroactivity:

Miller v. Johnson Controls, Inc., 2009 Ky. LEXIS 196 (2009)(finding no constitutional problem with 2000 statute that denied right to file combined return to corporate groups for years prior to 1995 (reinstating administrative position that had been reversed by court in

1994) even though clearly effort to stem loss of revenue resulting from judicial position) (with dissent).

Ex parte *City of Arab & Ala. Dep't of Revenue*, 7 So. 3d 379 (Ala. 2008)(allowing 1997 alteration of use tax to cure judicially expanded three-year gap in sales/use tax base)

U.S. Bancorp v. Dep't of Revenue, 337 Ore. 625 (2004)(allowing application of rule promulgated in 1995, in response to judicial decision, to apply to 1988-1992)

Moran Towing Corp. v. Urbach, 1 A.D.3d 722 (2003)(allowing retroactive effect to statute intended to cure commerce clause/apportionment problems with tax previously in effect)

Not all state courts have been as deferential, see, e.g., *City of Modesto v. National Med, Inc*., 128 Cal. App. 4th 518 (2005)(not allowing retroactive application of an ordinance that would replace unconstitutional (for failure to apportion) tax with constitutional tax).

Some states may have a bar to this type of curative legislation even when the litigation giving rise to the issue is still pending, e.g., *Phelps Dodge Corp. v. Revenue Div*, 103 N.M. 20 (1981) refusing to find a legislative act that undid a judicial decision rejecting an administrative position merely 'curative' when the judicial decision had found the statute unambiguous, and therefore refusing to apply it retroactively in light of the state constitutional prohibition on legislation that 'shall affect the right or remedy of either party * * * in any pending case.'

Subnational. Restraints based on the state constitutions on retroactivity frustrating contract-like rights. The state cases will be the most divergent in their approaches to this type of retroactivity, since the constitutional provisions relating to this type of retroactivity are far less uniform, and the propensity in each state to engage in the reliance-inducing behavior is different. Sample outcomes include:

Enterprise Leasing Co. v. Ariz. Dep't of Revenue, 211 P.3d 1, (Ariz. Ct. App. 2008)(allowing retroactive removal of the possibility of obtaining a credit for pollution control devices for motor vehicles. The credit was initially enacted in 1994, to begin in 1995; claims began to be filed in 1999 for credits motor vehicle devices; legislature reacted in March 2000 to clarify. The court held that whether the legislature intended to restore its original intent, or merely had decided that the costs involved were too great, there was no denial of due process in the legislation removing the credit.)

Baker v. Ariz. Dep't of Revenue, 209 Ariz. 561 (Ct. App. 2005, rev. denied)(allowing retroactive removal of incentives first defined in January, enhanced in April, enhancement removed in December, after moratorium in October. The unenhanced version can constitutionally be applied to a purchase made in September before the enhancement was removed without creating a contract clause problem; stating that *Carlton* 'clarifies that a retroactive modification of a tax benefit is constitutionally permissible as long as its purpose is neither illegitimate nor arbitrary and the period of retroactivity is modest. Nothing in the opinion limits constitutional retroactivity to drafting errors.'

Lower Vill. Hydroelectric Assocs. v. City of Claremont, 147 N.H. 73 (2001)(state law removing authority of municipalities to enter into agreements for payments in lieu of taxes violated state prohibition on retrospective laws even though formalities of agreement had not been completed).

Proof of actual reliance seems not to have made a difference in *International Home Foods, Inc., Rayovac Corp v Dep't of Treasury*, 264 Mich. App. 44 (2004)(holding that SBT, not constrained by 86-272, may be applied retroactively to taxpayer, despite fact that DOT had advised taxpayer it would have no tax liability).

Replan Dev., Inc. v. Department of Housing Preservation & Dev., 70 N.Y.2d 451(1987) (upholding removal of temporary special tax treatment for conversion of single-room-occupancy dwellings after taxpayer had purchased and begun construction on such a project).

First American Nat'l Bank v. Olsen, 751 S.W.2d 417 (1987)(permitting the inclusion of state bonds, exempt until disparate treatment of federal bonds under federal law raised

issues, in corporate franchise tax base, since that was not 'on' the bonds but on the privilege of doing business, and thus not impairing obligation of contracts, despite express constitutional prohibition on retroactivity).

3.20.5.3. **Testing against Article 1 of the First Protocol ECHR**

The courts in the United States would not be required to consider whether a US statute were invalid under this standard, and would be highly unlikely to refer to precedents of other jurisdictions in cases involving this kind of constitutional analysis.

3.20.5.4. **method for testing against principle of legal certainty**

The courts in the United States might well consider the desirability of legal certainty in determining whether the effect of a particular statute was 'harsh and arbitrary' and therefore denied due process of law, but there is no independent requirement relating to legal certainty.

3.20.5.5. **Interpretations by courts to avoid retroactivity**

Countless opinions will include reference to the idea that statutes should be interpreted so as to avoid issues regarding their validity, and interpretations of statutes that might raise issues regarding retroactivity are generally not excepted, even when the likelihood of the validity of the statute being threatened is small.

In *United States v. Wells Fargo Bank*, 485 U.S. 351 (1988), the Supreme Court openly acknowledged this practice when it interpreted a statute to exempt certain government debt only from income taxes, and not from estate tax, and thereby avoided questions regarding the constitutionality of a statute that had clarified that such debt was subject to estate tax after a judicial decision otherwise, with retroactive effect only for those who had included the debt in their transfer tax return. This approach to interpreting tax statutes has long been an uncontroversial practice; see, e.g., *Levy v. Wardell*, 258 U.S. 542 (1922) (rejecting out of hand the argument of the government that transfers made by a decedent dying in December 1916 completed in 1907 should be considered subject to the estate tax enacted in September 1916); *Shwab v. Doyle*, 258 U.S. 529 (1929)(similarly with respect to intent to tax transfers to trusts prior to effective date); *Reinecke v. Northern Trust*, 278 U.S. 339 (1929)(interpreting the 1921 estate tax to not include within the decedent's estate trusts which could only be revoked with the participation of someone in addition to the original grantor/decedent).

Subnational. A similar practice is common in the states, and ordinarily seems not be different in those states with express prohibitions and those states without. In at least one state, prospective operation (that is, the new decision will only apply after the most recently ended tax period) is required by statute when 'a reasonable person would not have expected the decision or order based on prior law, previous policy or regulation.' (§ 143.903 R.S.Mo.)

California Co. v. State, 141 Colo. 288(1959)(interpreting severance tax to apply only prospectively in state with specific prohibition on retroactivity; brief and unexceptional treatment).

In a handful of cases, however, the express prohibition may have resulted in a different interpretation than would have been reached otherwise. So long as the court understands itself to have the power to 'sever' the invalid portions of a statute and apply only the valid part, the court's decision may not reveal whether it is avoiding a constitutional problem by interpreting the intent of the statute to be only prospective, or whether it is simply refusing to enforce the invalid portion of the statute. See, e.g., *Roberts v. Gunter*, 251 Ga. 276, (1983) (bank share tax statute, passed in March 1975 stating that it did 'apply to all taxable years beginning on or after January 1, 1975,' could not retroactively impose a tax on property held by a bank before the statute was enacted, in violation of Ga. Const. 1983, Article I, Sec. I, Para. X.)

3.20.5.6. **Reasons for lack of judicial limits to retroactivity**

Courts in the United States are generally content to recite that Congress is free to make policy, limited only in very limited circumstances. The articulated approach with respect to retroactive tax laws is not different from the approach to all economic legislation that does not impinge upon a relatively small group of specially protected individual rights.

3.20.6. **Retroactivity of case law**

The Supreme Court of the United States has been inconsistent in its decisions over the last few decades with respect to the appropriateness of prospective overruling in general and with respective to tax rulings in particular. The inconsistencies are even greater when one looks not only at those cases in which the Court itself was determining whether to make its decision prospective only, but also those cases in which it reviewed a state court determination denying a refund remedy. In *Am. Trucking Ass'ns v. Smith*, 496 U.S. 167 (1990), eight members of the Court agreed that prospective application of *new* limitations on state taxing powers was appropriate; the difficulty in implementing this possibility is evidenced by the fact that, in this case, four members of the Court believed that the rule involved in this case was clear under prior law. In *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), the judgment of a badly divided Court resulted in the application of a new rule in a similar case retroactively. In *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), the Court confirmed that state courts considering similar challenges to statutes within their states were not free to apply their decisions only prospectively when the federal courts announcing the rule had applied them in the traditional retroactive way (although this retroactivity did not necessarily mean all taxpayers would be entitled to refunds). The effect of the Supreme Court's recent decision in *Danforth v. Minnesota*, 552 U.S. 264 (2008), observing that 'the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law' and concluding that state courts are free to apply new rules expanding the rights of criminal defendants with more retroactivity than is allowed in collateral attacks in federal courts is not yet known.

In tax cases arising in the states since *American Trucking*, furthermore, the Court has included language relating to the remedies that must be afforded taxpayers that many have read to preclude strictly prospective overruling. This language suggests that due process requires that in every case taxpayers must be given a chance to challenge a tax before payment, or have a right to a refund upon payment; the limitations on pre-payment challenges of many taxes in many jurisdictions suggests that prospective application of pro-taxpayer decisions may not suffice.

The evolution of this approach is considerably complicated by the difficulty that state taxpayers have in bringing their claims in federal courts. In general, if there is an adequate and efficient state remedy, state taxpayers may not have their challenges to state taxes heard in federal courts. Although state courts are far more likely to allow state taxpayers to proceed in their attacks on state taxes by way of class actions and without exhaustion of administrative remedies, they are far more accustomed to allowing state revenue departments and state legislatures formulate remedies other than refunds when challenges to state taxes are successful. Attempts by state legislatures to simply deny refunds, and by state courts to erect unexpected hurdles to such refunds may ultimately be successfully challenged when brought to the Supreme Court, see, e.g., 513 U.S. 106 (1994) and *McKesson Corp. v. Division of Alcoholic Beverages* 496 U.S. 18 (1990), cases involving such manoeuvring may languish for many years in the state court system.

Subnational. Many states courts have given their decisions striking down taxes prospective effect only. See, e.g., *Arizona State Tax Comm'n v. Ensign*, 257 P.2d 392 (1954), denying rehearing but giving prospectively only effect, 254 P.2d 1029 (Ariz. 1953).

It would appear that such practices would not run afoul of the Supreme Court's jurisprudence on the circumstances in which refunds of illegal taxes can be denied, so long as taxpayers had a meaningful pre-payment opportunity to avoid paying the tax.

3.20.7. **Views in the literature**

3.20.7.1. **Opinions regarding retroactivity**

In general, academic writers in the United States continue to find few constitutional problems with retroactive tax legislation. The desirability of the various transition policies when tax changes are made is still a matter of considerable debate.

The views of academic writers, and the tolerance implicit in the statements of the Supreme Court in its recent decisions, are for the most part not reflected in the actions of Congress. Congress, like the state legislatures, is careful not to enact legislation that is likely to be offensive to voters. Thus, although tax legislation is generally retrospective in its effect on returns from prior commitments and retroactive to the beginning of the taxable year in which it is enacted (or, where there is good excuse and adequate notice, a few months into the prior year), there is relatively little legislation with more severe retroactive effect. There is, therefore, relatively little activity that would have prompted further debate.[11]

The general expectation of retrospective effect on prior commitments has had the somewhat perverse effect of inducing legislative changes that are generally retrospective, but which include elaborate and particular 'grandfathering' provisions not all of which are visible to the general public. See, e.g., *Apache Bend Apartments v. United States*, 964 F.2d 1556 (5th Cir. 1992) (finding selective transition benefits not violating equal protection).[12] These selective grandfathering practices might not exist were more general anti-retroactivity policies in place.

In the scholarly literature. The premises, but not necessarily the conclusions, of the Graetz/Kaplow position are generally accepted in the scholarly fiscal literature in the United States. According to these premises, any change in law, no matter how its effective date is stated, will affect the value of existing commitments. Given this starting point, little effort is devoted to distinguishing the types of retroactivity that are invalid from those that must be allowed by their formal characteristics, rather than their effects on economic outcomes.

The premises shared by this body of scholarship also include the idea that all legal rules must be analysed with an emphasis on not just on the incentives created by such rules, but also their results in efficiency and welfare terms. The costs associated with the resulting outcomes must be compared with the outcomes that would obtain otherwise. The outcomes permissible under this approach (conveniently labelled 'ex ante') were in the earlier litera-

---

11. Several recent political developments provide evidence of this legislative behavior, and the resulting 'stall' in the more practical literature. In 2010 Congress actively considered several measures to which substantial objections on retroactivity grounds might have been raised. First, a special tax to be imposed on the bonuses received by executives working for financial firms that benefited from economic stimulus was debated but never enacted. Second, the estate tax portion of the transfer tax regime was allowed to expire (at least for one year) for decedents after 31 December 2009 (with an accompanying denial of a step-up in basis at death), and many proposals pending in 2010 would have retroactively reinstated it for these decedents. Legislation passed 18 December 2010, did so reinstate the tax, but allowed estates to elect to use the rules in place during 2010. Some observers believed that under the older Supreme Court precedents, a delay in enacting until 2011 would have subjected the reinstatement to substantially higher scrutiny. Lee Sheppard, 'Would Estate Tax Reinstatement be Constitutional?', 25 January 2010; Mitchell Gans, 'Retroactive Estate Tax: Can It Be Made Constitutional?', *Tax Notes*, 11 January 2010.
12. See generally Lawrence Zelenak, 'Are Rifle Shot Transition Rules and Other Ad Hoc Tax Legislation Constitutional?', 44 Tax L. Rev. 563 (1989).

ture often viewed as in tension with approaches that emphasize reliance and fairness ('ex post').

In general, the subsequent literature assumes the premise put forth by Graetz and concludes that the nominal effective date is morally (and therefore should be legally) irrelevant.[13] The more recent contributions to this debate have generally been sceptical both about whether a single transition policy is appropriate and whether the presence of an announced transition policy would in fact change taxpayer or legislative behaviour. See section 3.20.7.2 below for further discussion of the nuances of these approaches.

In practical politics. The closest that the Graetz position has come to being a conscious part of the real political debate on tax transition policy is in the discussion in the United States about the move from an income tax to a consumption tax.[14] That discussion is premised on the lack of quasi-constitutional constraint on retroactive tax changes. Even in that discussion, the focus was on 'minimizing unfair losses' and 'undeserved windfalls.' More recently, and despite a political climate increasingly hostile to embracing the notion that any tax change can appropriately be enacted retroactively, the Staff of the Joint Committee on Taxation has also embraced the Graetz approach.[15]

The Graetz/Kaplow position has never been whole-heartedly embraced beyond the academic literature. Neither author, for instance, seems ever to have been cited by a state court (although not all state courts would consider it appropriate to cite such material, many would). Graetz has been cited only twice by federal courts, and then only for the proposition that regulation generally should not be viewed as creating vested rights.

The distrust of the Graetz/Kaplow view among real political actors seems most obvious in the calls during the 1990s for constitutional amendments that would limit Congress' power to tax, including one proposal to amend the Constitution to provide that 'No Federal tax shall be imposed for the period before the date of enactment of the tax.' (The lack of precision in this language strongly suggests that the motives of its sponsors were largely political posturing in the wake of the 1994 *Carlton* decision, discussed above.)

Among practicing lawyers. There is an active group of anti-Graetz/Kaplow authors among the practicing bar. Perhaps the best indication of this is the more than a dozen student notes published in law reviews criticizing the result in 1994 Supreme Court decision in *Carlton*. There is considerably more litigation over the retroactivity of state tax measures than federal tax measures for several reasons. First, historically, states have felt greater fiscal stress and therefore state legislatures have frequently responded with legislation that either involves entirely new tax instruments or is less carefully drafted. Second, the power of the states to impose taxes is far more constrained than is the power of the federal government. (Such constraints are found not only in the federal Constitution's commerce clause but also in the various state constitutions and especially in the organic laws establishing various units of local government within the states). Therefore, states and their subunits are far more likely to be in a position to need curative tax legislation with retroactive effect (re-imposing the part of a tax instrument that would have been valid) and to limit a taxpayer's ability to obtain the benefit of newly articulated limits on the state taxing power, arguably with retroactive effect.

---

13. A symposium sponsored by the University of San Diego on these issues can be found at 13 J. Contemp. Leg. Issues (2003) and includes contributions by Barbara Fried, Louis Kaplow, Jill Fisch, Richard Epstein, Dan Shaviro and Kyle Logue.
14. See, for instance, United States Treasury, *Blueprints for Tax Reform*, at pp. 181-206, www.ustreas.gov/offices/tax-policy/library/blueprints/ch6.pdf.
15. Compare Retroactive Taxation: hearing before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, 103rd Cong, 2d Sess., on S.J. Res. 120, August 4, 1994 (1996), S. Hrg. 103-1080 (Serial No. J-103-66) with Joint Comm. on Taxation, Description and Analysis of Proposals to Replace the Federal Income Tax, (JCS-18-95), at 87-92 (5 June 1995), www.jct.gov.

The members of the tax bars in the various states therefore have a considerably greater stake in the continued vitality of anti-retroactivity doctrine. Their writings continue to raise objections to various types of retroactivity.[16]

3.20.7.2. **Debate on law and economics view**

The Graetz/Kaplow view of the interaction between the taxpayer and the legislature has been generally accepted in the academic literature in the United States. Its observations about the arbitrariness of attempts to distinguish among degrees of retroactivity are well accepted. Its limitations in the face of real political processes were exhaustively explored by Daniel Shaviro in *When Rules Change: An Economic and Political Analysis of Transition Relief And Retroactivity* (2000). Several more sceptical views have emerged which, although not rejecting the premises of the Graetz/Kaplow view, approach a complete rejection of its conclusions. These are driven by the observations of the wing of law and economics that views the restraint of government action to be among the most important constitutional principles. Under this view, a government that chooses too frequently to upset legitimate expectations will pay a very high price to induce any reliance on the part of economically rational actors.

The newer literature recognizes that the absence of a strong presumption against retroactivity is likely to change legislative behaviours in undesirable ways. Taxpayers with substantial pre-commitments are more likely to fear changes, and legislators are more likely to act in ways that allow them to benefit from those fears. As a result, with a presumption in favour of retroactivity and against general grandfathering, the cost of using the tax system to induce behaviour will inevitably increase. The methods through which the tax system can induce behaviours will change, as taxpayers will insist on more immediate benefits, for instance, through reductions in the time period during which taxpayers may be exposed to a legislative change of mind. Taxpayers with substantial pre-commitments will devote more resources to secure limited grandfathering.

It cannot be overemphasized that the scholarly debate referred to above, with very few exceptions, shows little awareness of the jurisprudence developed under the possible sources of federal limitation of retroactivity (which, in general, are consistent with the Graetz/Kaplow position tolerating considerable degrees of retroactivity) or the jurisprudence under the state limitations (which, as reported in section 3.20.5.2 above, are far less likely to be consistent with that position), or the literature or practices in other jurisdictions.

16. Paul Frankel and Amy Nogid, 'The Manifest Justice of The Manifest Injustice Doctrine: The Time has Come to Invoke the Ex Post Facto Clause to Bar Retroactive Tax Increases', 49 *State Tax Notes* (6 August 2008), at pp. 599 ff.; Jennifer Carr and Cara Griffith, 'Retroactive Taxation: A Necessary Evil', *State Tax Notes*, 31 October 31 2005, at p. 473. F. Daniel E. Troy, 'Retroactive Tax Increases and the Constitution', available at *www.heritage.org/Research/Taxes/HL613.cfm*; Ronald Z. Domsky, 'Retroactive Taxation: United States v. Carlton – The Taxpayer Loses Again', 16 N. *Ill. U. L. Rev.* 77 (1995-1996).